

2601  
**No. 12363**

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**United States**  
**Court of Appeals**  
**For the Ninth Circuit.**

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**YOUNG BROTHERS, LIMITED, Claimant of**  
**the Tug "Kolo" her boats, engines, machinery,**  
**tackle, etc.,**

**Appellant,**

**vs.**

**JOHN CHO,**

**Appellee.**

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**Apostles on Appeal**

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**Appeal from the United States District Court,**  
**Territory of Hawaii.**

**FILED**

**DEC 5 1949**

**PAUL P. O'BRIEN,**  
**CLERK**



No. 12363

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Court of Appeals  
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS  
OF RECORD

ROBERTSON, CASTLE and ANTHONY,  
By WILLIAM F. QUINN,

for the Libellant, John Cho.

312 Castle & Cooke Building,

Honolulu, T. H.

SMITH, WILD, BEEBE & CADES,  
By J. EDWARD COLLINS,

for the Respondent, The Tug "Kolo" etc.

Bishop Trust Building,

Honolulu, T. H.

## LIBEL

In the United States District Court for the  
Territory of Hawaii  
Admiralty No. 409

JOHN CHO,

Libellant,

vs.

The tug, "KOLO," her boats, engines, machinery,  
tackle, etc.,

Respondent.

Libel

To the Honorable J. Frank McLaughlin, Judge of  
the District Court of the United States within  
and for the District of Hawaii:

John Cho, an individual residing in Honolulu, City and County of Honolulu, in said District, owner of the sampan Tenyo Maru at the time of the events and happenings hereinafter set forth, exhibits this his libel against the motor driven tug Kolo, her boats, engines, machinery, tackle, apparel and furniture in a cause of negligent towage, civil and maritime, and thereupon alleges as follows:

First

The Libellant at the time of the events and happenings hereinafter set forth was the owner of the Tenyo Maru, an oil-screw wooden sampan of approximately nine net tons, register length 48.1 feet, breadth 10.7 feet, and depth 5 feet.

Second

The Kolo is a motor driven tug, official number

251620, with steel hull and 210 horsepower diesel engine, of 42.73 gross tonnage, 60.6 feet in length, 16.3 feet in breadth, and 6.2 feet in depth, owned by Young Brothers, Limited, a Hawaiian corporation having a usual place of business in Honolulu aforesaid.

### Third

On Saturday, April 3, 1948, the aforesaid Tenyo Maru went aground on a reef off the island of Molokai. Libellant was unable to engage a tug to salvage the Tenyo Maru until Tuesday, April 6, 1948. On the latter date the aforesaid tug Kolo, and the tug Mahoi, also owned by Young Brothers, Limited, towed the Tenyo Maru off the reef and into the harbor at Kaunakakai, Molokai. While on the reef, the Tenyo Maru developed a leak, requiring that her pumps be manned.

### Fourth

During the night of April 6, the Tenyo Maru remained at the pier at Kaunakakai. The vessel was taking water through a rip in her bottom. The rip could not be patched from the inside of the vessel because it was situated underneath the fuel tank, nor could repairs be made from the outside of the hull because there were no facilities at Kaunakakai to lift the vessel out of the water. A pump was manned aboard the vessel during the night and this sufficed to keep the inside dry. The captain of the Kolo came aboard the Tenyo Maru to advise and assist Libellant with respect to the condition of the damaged vessel.

## Fifth

At about noon on Wednesday, April 7, the aforesaid tug Kolo, disregarding the known unseaworthiness of the vessel, took the Tenyo Maru in tow. The damaged sampan retained a crew of three aboard to man the pump to keep up with the leakage. When the tug and tow proceeded into the channel between Molokai and Oahu, the damaged sampan began to take water at a rate far in excess of the capacity of the pumps. The crewmen aboard the sampan advised the captain of the Kolo of this fact, whereupon the Kolo increased its speed. About one half hour later, at approximately 3:30 P.M. o'clock, the decks of the sampan were awash. The Kolo cut the tow lines and proceeded back to pick up the crew of the sampan.

## Sixth

The damage suffered by the Libellant through the loss of said vessel is about Twelve Thousand Dollars (\$12,000.00).

## Seventh

The said loss was caused through no fault of the Libellant, but solely through the fault of those in charge of said motor-driven tug Kolo, as follows:

(1) In taking a vessel under tow which they knew or should have known was unseaworthy;

(2) In towing a leaking vessel through the rough waters of the Molokai channel;

(3) In failing to take proper action when advised that the vessel was taking more water than she could pump;

(4) In other faults to be shown at the trial of the action.



## Eighth

Said tug is, or shortly will be, in the port of Honolulu and within the admiralty and maritime jurisdiction of this Honorable Court.

## Ninth

All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and this Honorable Court.

Wherefore, Libellant Prays that process in due form of law may issue against the tug Kolo, her boats, engines, boilers, machinery, tackle, apparel and furniture, and against any and all persons having or claiming to have any interest therein, citing them to appear and answer all and singular the matters aforesaid, and that this Honorable Court will pronounce for the Libellant's damages and decree that the same may be paid, together with his costs and for such other and further relief as to right and justice may appertain, and as this Honorable Court is competent to give in the premises, and further, that the claimant may be ordered to answer under oath the interrogatories hereto subjoined.

Dated: Honolulu, T. H., September 30th, 1948.

/s/ JOHN CHO.

ROBERTSON, CASTLE &

ANTHONY,

Proctors.

Territory of Hawaii,

City and County of Honolulu—ss:

John Cho, being first duly sworn, upon oath deposes and says that he is the Libellant named in the

foregoing libel; that he has read the said libel, knows the contents thereof, and that the same is true.

/s/ JOHN CHO.

Subscribed and sworn to before me this 30th day of September, 1948.

[Seal] /s/ CHARLES Y. AWANA.

Notary Public, First Judicial Circuit, Territory of Hawaii.

My commission expires June 30, 1949.

[Endorsed]: Filed Oct. 12, 1948.

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[Title of District Court and Cause.]

INTERROGATORIES REFERRED TO IN THE  
FOREGOING LIBEL TO BE ANSWERED  
BY THE CLAIMANT UNDER OATH

1. On April 6, 1948, who was the owner of the tug Kolo?
2. On said date who operated said tug?
3. At what hour on April 7, 1948, did said tug take the sampan Tenyo Maru under tow?
4. Did the person operating said tug know that the aforesaid sampan had a rip in her bottom at the time she was taken in tow?
5. What was the prevailing wind on that day?
6. At what hour did said tug and said sampan enter the Molokai channel?
7. What was the size of the waves in said channel?
8. What was the velocity of the wind in said channel?

9. At what speed was the said tug proceeding when she entered said channel?

10. What changes of speed did said tug make after she took the sampan in tow, and at what hours were said changes made?

11. At what hour did the person operating said tug learn that said sampan was taking water badly?

12. What action did said person take upon learning of the sampan's difficulty as aforesaid?

13. At the time of the aforesaid difficulty, how far was said tug from Laau Point?

14. At what hour did the captain of the Kolo order that the tow line be cut?

15. What was the approximate location where the said sampan was cut loose?

16. Please annex hereto original deck log and engineer's log of said tug Kolo covering the voyage from the time when the tow left Kaunakakai to the time said tug arrived in Honolulu after having lost her tow.

/s/ ROBERTSON, CASTLE &  
ANTHONY,

By /s/ WILLIAM F. QUINN.

[Endorsed]: Filed Oct. 12, 1948.

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[Title of District Court and Cause.]

### MONITION AND ATTACHMENT

The President of the United States of America to  
the Marshal of the United States of America  
for the Territory of Hawaii—Greeting:

Whereas, a libel has been filed in the District

Court of the United States for the Territory of Hawaii on the 12th day of October, 1948, by John Cho, a resident of Hawaii, Libellant, against the motor driven tug Kolo, in a cause, civil and maritime, for the reasons and causes in the said libel mentioned, and praying the usual process and monition of the said Court in that behalf to be made, and that all persons interested in the said vessel, her boilers, engines, tackle, apparel, cargo and furniture, may be cited in general and special, to answer the premises, and all proceedings being had against said vessel, her boilers, engines, tackle, apparel, cargo and furniture, may for the causes in the said libel mentioned be condemned and sold to pay the demands of Libellant.

You Are Therefore Hereby Commanded to attach the said vessel, her boilers, engines, tackle, apparel, cargo and furniture and to retain the same in your custody until further order of the Court regarding the same and to give due notice to all persons claiming the same or knowing or having anything to say why the same should not be condemned and sold pursuant to the prayer of said libel; that they be and appear before the said Court to be held in and for the Territory on the 22d day of October, 1948, at 10 o'clock, A.M. of said day, if that day shall be a day of jurisdiction, otherwise on the next day of jurisdiction thereafter, then and there to interpose a claim for the same and to make their allegations in that behalf. And what you shall have done in the premises you do then and there make return thereof, together with this writ.

Witness, the Honorable J. Frank McLaughlin, Judge of said Court at the City of Honolulu, in the Territory of Hawaii, this 12th day of October, 1948, and of our Independence the one hundred seventy-third.

[Seal]      /s/ WM. F. THOMPSON, JR.,  
Clerk.

ROBERTSON, CASTLE &  
ANTHONY,

By /s/ WILLIAM F. QUINN,  
Proctors for Libellant.

[Endorsed]: Filed Oct. 12, 1948.

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[Title of District Court and Cause.]

STIPULATION FOR LIBELLANT'S COSTS

Stipulation for Libellant's costs, entered into pursuant to the rules and practices of this Court.

Whereas, a libel will be filed in this Court on or about October 12, 1948, by John Cho, Libellant, a resident of Hawaii, against the motor-driven tug Kolo in a cause civil and maritime, for the causes in the said libel mentioned; and praying that process may issue against said tug Kolo, her boats, engines, machinery, tackle, apparel and furniture, and the said Libellant and Herbert K. North, stipulator, parties hereto, hereby consenting and agreeing that in case costs are awarded against the said Libellant or said stipulator, the decree therefor not exceeding the sum of Two Hundred Fifty and 00/100 Dollars (\$250.00) may be entered against them and each

of them, and thereupon execution may issue against their and each of their goods, chattels, lands, tenements and other real estate; Now Therefore,

It Is Hereby Stipulated and Agreed, for the benefit of whom it may concern, that the Libellant herein, John Cho, residing at 3638 Leahi Avenue, in the city of Honolulu, and by occupation a fish merchant, and stipulator Herbert K. North, residing at 2314 S. Beretania Street, in the city of Honolulu, and by occupation a boat charterer, shall be and each of them is hereby bound in the sum of Two Hundred Fifty and 00/100 Dollars (\$250.00), conditioned that they shall pay all costs and expenses which shall be awarded against said Libellant and/or the stipulator undersigned or any one of them by decree of this Court and in case of appeal by any appellate court.

Dated: Honolulu, T. H., October 6, 1948.

/s/ JOHN CHO,  
Libellant.

/s/ HERBERT K. NORTH,  
Stipulator.

Taken and acknowledged before me this 6th day of October, 1948. .

[Seal] /s/ CHARLES Y. AWANA.  
Notary Public, First Judicial Circuit, Territory of  
Hawaii.

My commission expires June 30, 1949.



Territory of Hawaii,  
City and County of Honolulu—ss:

John Cho and Herbert K. North, being duly sworn, each deposes and says that he is worth the sum of Five Hundred Dollars (\$500.00) over and above all his debts and liabilities.

/s/ JOHN CHO,

/s/ HERBERT K. NORTH.

Subscribed and sworn to before me this 6th day of October, 1948.

[Seal] /s/ CHARLES Y. AWANA.

Notary Public, First Judicial Circuit, Territory of Hawaii.

My commission expires June 30, 1949.

[Endorsed]: Filed Oct. 12, 1948.

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[Title of District Court and Cause.]

CLAIM OF OWNER

And Now Appears Young Brothers, Limited, a Hawaiian corporation, intervening for itself as owner of the tug "Kolo," her boats, engines, machinery, tackle, etc., before this Honorable Court, and makes claim to the said the tug "Kolo," her boats, engines, machinery, tackle, etc., as the same are or may be attached by the Marshal under process of this Court, at the instance of John Cho, and

the said Claimant, Young Brothers, Limited, a Hawaiian corporation, avers that it was at the time of the filing of the libel herein and still is the true and bona fide sole owner of the said the tug "Kolo," her boats, engines, machinery, tackle, etc., and that no other person is the owner thereof; wherefore it prays to defend accordingly.

Dated: Honolulu, T. H., October 11th, 1948.

YOUNG BROTHERS,  
LIMITED,

By /s/ E. T. HARRISON,  
Vice-President.  
Claimant.

SMITH, WILD, BEEBE &  
CADES,  
Proctors for Claimant.

Territory of Hawaii,  
City and County of Honolulu—ss:

E. T. Harrison, being duly sworn, deposes and says:

That he is the Vice-President of Young Brothers, Limited, a Hawaiian corporation, the Corporation described in and which executed the foregoing Claim; that he has read the said Claim and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief; that he knew the seal of the said corporation; that the seal affixed to the said Claim was such corporate seal; that it was so affixed by authority of the Board



of Directors of said corporation, and that he signed his name thereto by like authority.

/s/ E. T. HARRISON.

Subscribed and sworn to before me this 11th day of October, 1948.

[Seal]      /s/ CHAS. AKANA,  
Notary Public, First Judicial Circuit, Territory of  
Hawaii.

My Commission expires June 30, 1949.

[Endorsed]: Filed Oct. 12, 1948.

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[Title of District Court and Cause.]

### RELEASE BOND

Whereas, a libel was filed in this Court on the 12th day of October, A. D. 1948, by John Cho, libelant, against the tug "Kolo," her boats, engines, machinery, tackle, etc., respondent, for the reasons and causes in said libel mentioned and claim to the tug "Kolo," her boats, engines, machinery, tackle, etc., has been filed by Young Brothers, Limited, a Hawaiian corporation; and the said claimant hereby consenting and agreeing that in case of default or contumacy on the part of the claimant, execution may issue against its goods, chattels and lands for the sum of Fifteen Thousand and no/100ths Dollars (\$15,000.00),

Now, Therefore, it is hereby stipulated and agreed for the benefit of whom it may concern that the stipulator undersigned shall be and is hereby bound in the sum of \$15,000.00, conditioned that if Young Brothers, Limited, a Hawaiian corporation, claim-

ant above named, shall abide by all orders, interlocutory or final, of this Court, and pay all money awarded by final decree rendered in this cause, together with interest and costs, or in case of appeal, by any appellate court, then this stipulation is to be void; but otherwise shall remain in full force and effect.

Dated: Honolulu, T. H., October 12, 1948.

YOUNG BROTHERS,  
LIMITED,

By /s/ E. T. HARRISON,  
Vice-President.

By /s/ J. B. GUARD, SR.,  
Treasurer.

It Is Hereby Agreed that the foregoing bond is sufficient in form, substance and amount and that no stipulation for costs need be filed by the claimant in the above entitled action.

Dated: Honolulu, T. H., October 12, 1948.

ROBERTSON, CASTLE &  
ANTHONY,

By /s/ WILLIAM F. QUINN,  
Proctors for Libelant.

[Endorsed]: Filed Oct. 12, 1948.

---

[Title of District Court and Cause.]

ANSWER

To the Honorable, the Judges of the District Court  
of the United States in and for the District of  
Hawaii:

The answer of Young Brothers, Limited, a Hawaiian corporation, owner and claimant of the tug Kolo, to the libel of John Cho, owner of the sampan Tenyo Maru, against the tug Kolo in a cause of negligent towage, civil and maritime, alleges as follows:

#### First

That it has no information or belief sufficient to enable it to answer the allegations of the article numbered "First" of the libel herein and therefore calls for strict proof thereof, if relevant.

#### Second

That it admits the allegations of the article numbered "Second" of the libel herein.

#### Third

Answering the allegations of the article numbered "Third" of the libel herein, that it admits that on Tuesday, April 6, 1948, the tug Kolo and the tug Mahoe towed the Tenyo Maru off a reef lying off the Island of Molokai and that the tug Kolo did tow the Tenyo Maru into the harbor at Kaunakakai, Molokai; that it admits that the Tenyo Maru developed a leak and said leak required that pumps be manned while at the harbor of Kaunakakai, Molokai; and that it alleges that it has no information or belief sufficient to enable it to answer the balance of the allegations contained in this article of the libel herein and therefore calls for strict proof thereof, if relevant.

## Fourth

Answering the allegations of article numbered "Fourth" of the libel herein, that it admits that during the night of April 6th the Tenyo Maru remained at the pier at Kaunakakai taking water and that at some time during the night a pump was manned aboard the vessel. That it further admits that the captain of the Kolo went aboard the Tenyo Maru while at the pier at Kaunakakai to observe her condition. That it alleges that it has no information or belief sufficient to enable it to answer the further allegations of this article of the libel and therefore calls for strict proof thereof, if relevant.

## Fifth

Answering the allegations of the article numbered "Fifth" of the libel herein, that it admits that on or about noon on Wednesday, April 7, the tug Kolo took the Tenyo Maru in tow. That it admits that the sampan Tenyo Maru retained a crew of three aboard. That it admits that when the tug and the tow were in the channel between Molokai and Oahu, it was observed that the sampan was low in the water and on or about 4:00 o'clock P.M. the decks of the sampan were awash and thereupon the Kolo cut the tow lines and proceeded back to pick up the crew of the sampan. That it alleges that it has no information or belief sufficient to enable it to answer the further allegations of this article of the libel and therefore calls for strict proof thereof, if relevant.

## Sixth

That it alleges that it has no information or belief

sufficient to enable it to answer the allegations set forth in the article numbered "Sixth" of the said libel and therefore calls for strict proof thereof, save and except that it admits that libelant has demanded payment of the sum of \$12,000.00 from the respondent and alleges that respondent has paid neither the whole nor any part thereof to the libelant.

#### Seventh

That it denies the allegations set out in the article numbered "Seventh" of the libel and that the alleged loss was due to any carelessness and/or negligence and/or fault of the respondent and/or its agents and/or employees.

#### Eighth

That it admits that the tug Kolo is within the admiralty and maritime jurisdiction of this Honorable Court.

#### Ninth

That it denies that all and singular, or all or singular, the premises are true (except as heretofore specifically admitted) but admits that if true they are within the admiralty and maritime jurisdiction of this Honorable Court.

#### Tenth

And further answering said libel and as a separate defense, the claimant alleges that on or about noon, on Wednesday, April 7, 1948, the owner of the sampan Tenyo Maru, despite his, said owner's, knowledge that the master of the tug Kolo was without authority to undertake a tow without obtaining

prior permission from the proper officers of the claimant, prevailed upon the master of said tug, who had like knowledge, to take said sampan into tow; that at the time said master undertook said tow under the circumstances aforesaid he was acting gratuitously and as the servant of the owner of said sampan and wrongfully using said claimant's tug in the aforesaid service.

### Eleventh

And further answering said libel and as a separate defense, the claimant alleges that the libelant, owner of the sampan Tenyo Maru did, on prevailing upon said master of the tug Kolo to undertake the tow to the port of Honolulu as aforesaid, furnish for towage a vessel unseaworthy in the following respects, to-wit: that said vessel had been and was taking water in large quantities through ruptures in her skin; the pump aboard the said vessel was inadequate in quality and capacity to keep her free of sea water in the then condition of her hull; her crew was composed of incompetent, careless and inattentive persons; she was placed in charge of an incompetent person by the libelant; and that said unseaworthy condition in all particulars and details as set out aforesaid was well known to the libelant, owner thereof, at all times material hereto, and in particular at the time of prevailing upon the master of the Kolo to undertake the tow and at the time the sampan was turned over for towage, and that said unseaworthy condition was the sole cause of the loss of the sampan Tenyo Maru.



Wherefore, claimant demands that the libel herein be dismissed with costs.

YOUNG BROTHERS,  
LIMITED,

By /s/ E. T. HARRISON,  
Vice-President.

Claimant.

SMITH, WILD, BEEBE &  
CADES,

Proctors for Claimant.

Territory of Hawaii,

City and County of Honolulu—ss:

E. T. Harrison, being duly sworn, deposes and says:

That he is the Vice-President of Young Brothers, Limited, a Hawaiian corporation, the Corporation described in and making the foregoing Answers; that he has read the said Answer and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief; that he knew the seal of the said corporation; that the seal affixed to the said Answer was such corporate seal; that it was so affixed by authority of the Board of Directors of said corporation, and that he signed his name thereto by like authority.

/s/ E. T. HARRISON.

Subscribed and sworn to before me this 4th day of November, 1948.

[Seal] /s/ ROBERT T. TSUCHIYA,  
Notary Public, First Judicial Circuit, Territory of  
Hawaii.

My Commission expires Feb. 14, 1951.

[Endorsed]: Filed Nov. 5, 1948.

[Title of District Court and Cause.]

### ANSWERS TO INTERROGATORIES

Answers of Edward T. Harrison, manager of Young Brothers, Limited, claimant herein, to interrogatories propounded in this cause:

1. To the first interrogatory he says:

Young Brothers, Limited, a Hawaiian Corporation.

2. To interrogatory number 2 he says:

Young Brothers, Limited, owned said tug, and Joseph Kahiapo was the master, but at the time of the casualty referred to in the libel and at the time of taking said sampan into tow and thereafter, said Kahiapo was acting without authority from Young Brothers, Limited, or any of its officers, and against the direct order of the company.

3. To interrogatory number 3 he says:

According to the log of the tug Kolo, 12:15 P.M.

4. To interrogatory number 4 he says:

He understands that the aforesaid sampan was leaking and that the person operating said tug knew such fact, but that such person is not now in the employ of Young Brothers, Limited, and has not been in the employ of said Young Brothers, Limited, since the day after the occurrence.

5. To interrogatory number 5 he says:

On information and belief, it was a normal trade wind.

6. To interrogatory number 6 he says:

According to the log, one and a half hours after leaving Kaunakakai.



7. To interrogatory number 7 he says:

No one aboard said vessel at said time is now in the employ of the company, so the question cannot be answered.

8. To interrogatory number 8 he says:

No one aboard said vessel at said time is now in the employ of the company, so the question cannot be answered.

9. To interrogatory number 9 he says:

No one aboard said vessel at said time is now in the employ of the company, so the question cannot be answered.

10. To interrogatory number 10 he says:

No one aboard said vessel at said time is now in the employ of the company, so the question cannot be answered.

11. To interrogatory number 11 he says:

About 3:00 o'clock P.M.

12. To interrogatory number 12 he says:

According to the log, had to abandon tow one and a half hours away from Laau Point, picked up crew of sampan and proceeded to Honolulu.

13. To interrogatory number 13 he says:

From eight to ten miles.

14. To interrogatory number 14 he says:

Between 3:00 and 3:30 o'clock P.M.

15. To interrogatory number 15 he says:

According to the log, would judge about in the middle of Molokai Channel.

16. To interrogatory number 16 he says:

Do not keep engineering room log, but herewith copy of deck log.

/s/ EDWARD T. HARRISON.

Territory of Hawaii,  
City and County of Honolulu—ss.

Edward T. Harrison, being duly sworn, deposes and says:

That he is First Vice President and General Manager of Young Brothers, Limited, a Hawaiian corporation; that the foregoing answers to interrogatories subscribed by him are true to the best of his knowledge, information and belief.

/s/ EDWARD T. HARRISON.

Subscribed and sworn to before me this 4th day of November, 1948.

[Seal] /s/ ROBERT T. TSUCHIYA,  
Notary Public, First Judicial Circuit, Territory of  
Hawaii.

My Commission expires Feb. 14, 1951.

Receipt of copy acknowledged.

Young Brothers, Ltd.

KOLO

Honolulu, T. H., April 6, 1948

Leave	Work	Return
0700	Check and Warm Engine	
0720	YB #9 from Mahoe to Kolo	0840
0840	Stand by YB #9	1400
1400	Check Engine	

1415	YB #9 from Kolo to Mahoe	
	Return crew to Kolo	1510
1510	Proceed to Kaunakakai	
	Arrive Kaunakakai	1600
1615	Assist Tenyo Maru from Beach. Assist Tenyo Maru to dock at Kaunakakai wharf. Secure	1800

Launchman Kahiapo, Makua, Ballisto.

Certified Correct

/s/ E. T. HARRISON,  
General Manager.

Young Brothers, Ltd.

KOLO Honolulu, T. H., April 7, 1948

Leave	Work	Return
0730	Check and Warm Engine	
0800	Stand by Tenyo Maru	1100
1100	Prepare Tenyo Maru for tow	
1215	Proceed with Tenyo Maru under tow to Honolulu—Pumps gave out 1 hour away from Laau Pt. Tenyo Maru be- gan sinking fast. Had to abandon tow 1½ Hour away from Laau Pt. Picked up crew and proceeded to Honolulu . . . Arrive Honolulu—Secure	2000

Launchman Kahiapo, Makua, Ballisto.

Certified Correct

/s/ E. T. HARRISON,  
General Manager.

[Endorsed]: Filed Nov. 5, 1948.

[Title of District Court and Cause.]

## BILL OF COSTS

Comes now John Cho, Libellant herein, and respectfully presents the following as his bill of costs:

Filing fee, U. S. District Court	\$15.00
Notarial fee to C. Y. Awana	1.25
Witness fees to U. S. Marshal	8.00
Service fees to U. S. Marshal	4.87
Proctors' docket fees, per 28 U.S.C.	
Section 1923	20.00
<hr/>	
Total	\$49.12

Attached hereto and marked Exhibit A is the affidavit of Thomas M. Waddoups in support of this bill of costs.

Dated: Honolulu, T. H., June 6, 1949.

ROBERTSON, CASTLE &  
ANTHONY

By /s/ THOMAS M. WADDOUPS,  
Proctors for John Cho,  
Libellant.

Approved:

/s/ J.F.Mc.

## EXHIBIT A

Affidavit of Thomas M. Waddoups  
Territory of Hawaii,  
City and County of Honolulu—ss.

Thomas M. Waddoups, being first duly sworn, on oath deposes and says that he is a member of the law firm of Robertson, Castle & Anthony, proctors for John Cho, Libellant above named; that the

items enumerated in the foregoing bill of costs, except the item provided for by statute, are all correct and were necessarily incurred in this case, and the services for which the statutory fee was charged were actually and necessarily performed.

/s/ THOMAS M. WADDOUPS.

Subscribed and sworn to before me this 6th day of June, 1949.

[Seal]     /s/ CHARLES Y. AWANA,  
Notary Public, First Judicial Circuit, Territory of  
Hawaii.

My commission expires June 30, 1949.

Receipt of copy acknowledged.

[Endorsed]: Filed June 8, 1949.

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[Title of District Court and Cause.]

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case having been heard on April 25 and 26, 1949, briefs having been filed on May 9, 1949, and counsel having been heard in oral argument on May 12, 1949, and proctor for respondent having moved to reopen for additional evidence on Tuesday, May 24, 1949, said motion having been granted and additional evidence having been adduced, the Court makes the following findings of fact and conclusions of law:

### Findings of Fact

(1) The sampan Tenyo Maru, owned by John Cho, libellant herein, was aground on a reef off

Molokai, Territory of Hawaii, from April 3 to April 6, 1948.

(2) That on April 6, 1948, the said sampan was towed off the reef by the tugs, Kolo and Mahoe, owned by claimant, Young Brothers, Limited, a Hawaiian corporation.

(3) That on April 7, 1948, the lawful master of the tug, Kolo, Joseph Kahiapo, undertook to tow the sampan Tenyo Maru from Kaunakakai, Molokai, to Honolulu, Oahu.

(4) That at the time the said Tenyo Maru was taken in tow, its hull was damaged in an area 3-inches wide and about one and a half feet long and it was in an unseaworthy condition as a result of having been on the reef as hereinbefore stated and that the libellant, John Cho, and the master of the tug, Kolo, knew said sampan was unseaworthy.

(5) That when the tug, Kolo, and its tow were 8 to 10 miles from Molokai, in the Molokai Channel, the sampan had taken water to the extent that her decks were awash and she had 3 to 4 feet of freeboard in the tow.

(6) That when the sampan was observed in such condition she was being towed astern of the tug by a hempen hawser.

(7) That Joseph Kahiapo was an inexperienced tug master having had no prior experience in open sea salvage towing and that due to said inexperience, Kahiapo immediately ordered the towline cut and returned to pick up the crew of the sampan although he was advised by Eberesto Abell, an



experienced crewman on the tug that said sampan would not sink and that the towline should not be cut.

(8) That the sampan being without cargo and having received a major overhaul of her hull in 1944, and having been placed in drydock for all necessary repairs at least once every five months since 1946 until the date of the occurrence here involved, had sufficient positive buoyancy to remain afloat and could in fact have been towed to Honolulu had she not been cut loose by the master of the Kolo.

(9) That when last seen the Tenyo Maru was still floating, decks awash, in the Molokai Channel.

#### Conclusions of Law

(1) That negligent towage is a maritime tort rendering the offending vessel liable in rem so long as said vessel is in the hands of a person having lawful possession of her.

(2) That both libellant and the master of the Kolo were negligent in taking a known unseaworthy craft in tow.

(3) That the master of the Kolo failed to exercise that degree of care and skill required of the master of a tug in open sea towage when he cut the Tenyo Maru adrift under circumstances where there was no necessity for so doing.

(4) That the aforesaid negligence of the master of the tug, Kolo, was the sole cause of the loss of the sampan, Tenyo Maru, and the respondent vessel is solely liable for full damage suffered by libellant

as the result of such negligence.

A decree embodying the above conclusions will be signed upon presentation.

Dated: Honolulu, Hawaii, June 3, 1949.

/s/ J. FRANK McLAUGHLIN,  
District Judge.

Approved as to form:

/s/ J. EDWARD COLLINS.

[Endorsed]: Filed June 8, 1949.

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In the United States District Court  
For the Territory of Hawaii  
Admiralty No. 409

JOHN CHO,

Libellant,

vs.

The tug KOLO, her boats, engines, machinery,  
tackle, etc.,

Respondent.

### DECREE

This cause having been heard on the pleadings and proofs and having been argued and submitted by the advocates for the respective parties and due deliberation having been had, It Is Now on motion of William F. Quinn, proctor for the libellant, Ordered, Adjudged and Decreed that the libellant recover of and from the respondent herein the sum of \$8,000.00 with interest thereon from April 7, 1948, at the rate of 6%, amounting to \$560.00 to-



gether with the libellant's costs taxed in the sum of \$49.12 and amounting in all to the sum of \$8,609.12 with interest thereon until paid, and that the libellant have execution therefor, and

It Is Further Ordered, Adjudged and Decreed, that unless this decree be satisfied or an appeal be taken within ten (10) days after service of a copy of this decree with notice of entry upon the claimant or its proctors, claimant and its stipulators for costs and value will perform the engagement of their stipulations or show cause within four days after the expiration of said ten days, or on the first day of jurisdiction thereafter, why execution should not issue against them, their goods, chattels and lands to satisfy this decree.

Dated: Honolulu, Hawaii, June 3, 1949.

/s/ J. FRANK McLAUGHLIN,  
District Judge.

Approved as to form:

/s/ J. EDWARD COLLINS.

[Endorsed]: Filed June 8, 1949.

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[Title of District Court and Cause.]

### NOTICE OF APPEAL

Sirs:

Please take notice that the claimant in the above-entitled cause, Young Brothers, Limited, hereby appeals to the next United States Circuit Court of Appeals for the Ninth Circuit from the final decree

of this Court entered herein the 8th day of June, 1949, and from each and every part of said decree. The claimant does not intend to make new pleadings or to take new proofs in this appeal.

Dated, Honolulu, T. H. June 18, 1949.

Yours respectfully,

SMITH, WILD, BEEBE &  
CADES,

By /s/ J. EDWARD COLLINS,  
Proctors for Claimant.

To:

WILLIAM F. QUINN,  
ROBERTSON, CASTLE & ANTHONY,  
Proctors for Libelant.

[Endorsed]: Filed June 18, 1949.

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[Title of District Court and Cause.]

ORDER ALLOWING APPEAL

The within appeal is hereby allowed.

/s/ J. FRANK McLAUGHLIN,  
U. S. District Judge.

Dated at Honolulu, T. H. June 18, 1949.

[Endorsed]: Filed June 18, 1949.

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[Title of District Court and Cause.]

ORDER AUTHORIZING ACCEPTANCE OF  
CERTIFIED CHECK IN LIEU OF BOND

It Is Hereby Ordered, Adjudged and Decreed that the Clerk of the United States District Court for the Territory of Hawaii is authorized to accept

a certified check in the amount of \$250.00 from the claimant in the above-entitled action in lieu of an appeal bond as required by Rule 73(c) of the rules of procedure for the District Courts of the United States; said certified check to be surrendered by the Clerk of the United States District Court for the Territory of Hawaii upon the posting by the claimant herein of an appeal bond in that amount.

Dated: Honolulu, T. H. June 18, 1949.

/s/ J. FRANK McLAUGHLIN,  
U. S. District Judge.

[Endorsed]: Filed June 20, 1949.

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[Title of District Court and Cause.]

### BOND FOR COSTS ON APPEAL

Know All Men By These Presents:

That Young Brothers, Limited, a Hawaiian corporation, as principal, and The Aetna Casualty and Surety Company, a corporation organized under the laws of the State of Connecticut, as surety, are held and firmly bound unto John Cho, libelant, in the sum of \$250.00 for the payment of which well and truly to be made, said Young Brothers, Limited, as principal, and The Aetna Casualty and Surety Company, as surety, do bind themselves, their respective successors and assigns, jointly and severally, and firmly by these presents.

The Condition Of This Obligation Is Such That:

Whereas the above bounden principal, Young

Brothers, Limited, has filed its notice of appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the decree entered in the above-entitled cause;

Now, Therefore, if the said principal shall prosecute said appeal with effect and answer all costs if it fails to sustain said appeal, then this obligation shall be void, otherwise it shall remain in full force and effect.

Dated: Honolulu, T. H. this 21st day of June, 1949.

YOUNG BROTHERS,  
LIMITED

By /s/ W. F. DILLINGHAM,  
Its President.

[Corporate Seal]

By /s/ J. B. GUARD,  
Its Secretary.  
Principal.

THE AETNA CASUALTY AND SURETY COM-  
PANY.

[Seal] By /s/ R. W. RONALD,  
Resident Vice-Pres.  
Surety.

Attest:

/s/ LAURA CARTER,  
Resident Asst. Sec.

Territory of Hawaii,  
City and County of Honolulu—ss.

On this 21st day of June, 1949, before me appeared W. F. Dillingham and J. B. Guard, to me

personally known, who, being by me duly sworn, did say that they are the President and Secretary, respectively, of Young Brothers, Limited, a Hawaiian corporation, and that the seal affixed to the foregoing instrument is the corporate seal of said corporation, and that the instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors, and the said W. F. Dillingham and A. B. Guard acknowledged said instrument to be the free act and deed of said corporation.

[Seal]     /s/ CECILIA MARTIN SLATE,  
Notary Public, First Judicial Circuit, Territory of  
Hawaii.

My commission expires Aug. 29, 1951.

[Endorsed]: Filed June 21, 1949.

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[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING OF  
RECORD ON APPEAL AND DOCKETING  
OF APPEAL

Good cause appearing therefor,

It Is Hereby Ordered that the claimant-appellant herein shall have until August 31, 1949 for the filing and docketing of the appeal herein.

Dated: Honolulu, T. H., July 27, 1949.

/s/ J. FRANK McLAUGHLIN,  
U. S. District Judge.

[Endorsed]: Filed July 27, 1949.

[Title of District Court and Cause.]

CITATION ON APPEAL

To the Libellant Above Named:

To Robertson, Castle & Anthony, 312 Castle & Cooke Building, Honolulu, Hawaii, Proctors for Libellant:

To William F. Thompson, Jr., Clerk, United States District Court for the District of Hawaii:

Whereas the claimant herein, Young Brothers, Limited, has lately appealed to the United States District Court of Appeals for the Ninth Circuit from an entry of a judgment and decree in favor of the libellant and against the respondent, which judgment and decree was entered in the District Court of the United States of America for the District of Hawaii against the tug "Kolo", her boats, engines, machinery, tackle, etc., on June 8, 1949;

You are therefore hereby cited to appear before the United States Court of Appeals for the Ninth Circuit to be held in the City of San Francisco, State of California, thirty days after the date of this citation to do and receive what may appertain to justice to be done in the premises.

Given unto my hand in Honolulu, City and County of Honolulu, Territory of Hawaii, on the 25th day of August, 1949.

/s/ J. FRANK McLAUGHLIN,  
U. S. District Judge.



[Title of District Court and Cause.]

## ASSIGNMENTS OF ERRORS

Comes now the claimant-appellant, Young Brothers, Limited, and hereby assigns as error in the proceedings, orders, decision, judgment and decrees of the above District Court in the above-entitled action, the following:

1. That the District Court erred in rendering and entering its findings of fact and conclusions of law herein dated June 3, 1949;

2. That the District Court erred in rendering and entering its final decree herein dated June 3, 1949;

3. That the District Court erred in holding and deciding that the Tug "Kolo" was liable in rem for the loss of the Sampan "Tenyo Maru" under the facts of the case;

4. That the District Court erred in not holding and deciding that the Master of the Tug "Kolo", being without authority to take the tow of the Sampan "Tenyo Maru" and such lack of authority being known to the libelant-appellee, owner of the Sampan "Tenyo Maru", or such knowledge being imputable to him, the Tug "Kolo" is not liable for the loss of the Sampan occurring in the course of the unauthorized tow.

5. That the District Court erred in holding and deciding that the Tug "Kolo" was solely liable for the full damage suffered by the libelant.

6. That the District Court erred in holding and deciding that the Master of the Tug "Kolo" was



negligent in cutting the towline on the Sampan "Tenyo Maru" and that said negligence was the sole cause of the loss of the sampan.

7. That the District Court erred in holding there was no necessity for cutting the tow loose under the circumstances and that in so doing the Master of the Tug "Kolo" failed to exercise the degree of care and skill required of a tug master in open sea towage.

8. That the District Court erred in not holding and deciding that the Master of the Tug "Kolo" acted in a reasonable and prudent manner in cutting loose a tow which was awash; that he used his best judgment in cutting said towline to save the lives of those aboard the tow; that he used his best judgment in cutting said towline to save the lives of those aboard the Tug "Kolo" and to save the Tug "Kolo" itself; that the Sampan "Tenyo Maru", being awash, could not be towed to safety; and that the course pursued by the Master of the Tug "Kolo" was the best and most logical one to pursue under the circumstances; but that if he were guilty of fault, such fault consisted of a mere error of judgment, which was legally excusable under the circumstances of the case.

9. That the District Court erred in not holding and deciding that the Master of the Tug "Kolo" used proper seamanship at all times in attempting to save his vessel and the lives of his crew following the flooding of the Sampan "Tenyo Maru" and if the course he followed to save his vessel and crew

was erroneous, such course was legally excusable under the circumstances existing in the case.

10. That the District Court erred in not holding and deciding that the loss of the Sampan "Tenyo Maru" was caused by her unseaworthy condition, which condition was known to the libelant-appellee at the time that the tow of the Sampan "Tenyo Maru" was undertaken.

11. That the District Court erred in not holding and deciding that the Sampan "Tenyo Maru" could not have been towed to safety, her decks being awash and her compartments flooded in the Molokai Channel.

12. That the District Court erred in not holding and deciding that no damages should be awarded against the Tug "Kolo" for the loss of the Sampan "Tenyo Maru" in the course of a tow either known by the libelant-appellee to be an unauthorized tow with respect to the owners of the tug or under circumstances where such knowledge was properly imputed to him.

13. That the District Court erred in awarding to the libelant-appellee its final decree in the sum of \$8,000.00 with interest and costs, and in not holding, deciding and decreeing that any damage sustained by the libelant as the result of the loss of the Sampan "Tenyo Maru" was directly attributable to the unseaworthy condition of said sampan at the time she was delivered to the Tug "Kolo" for tow to Honolulu, which unseaworthy condition was known to the libelant and that at

least one-half of the total damage resulting from the loss of the Sampan "Tenyo Maru" should be awarded against the libellant-appellee.

Dated: Honolulu, T. H., this 25th day of August, 1949.

SMITH, WILD, BEEBE &  
CADES

By /s/ J. EDWARD COLLINS,  
Proctors for Appellant.

[Endorsed]: Filed Aug. 25, 1949.

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[Title of District Court and Cause.]

APPELLANT'S DESIGNATION OF APOS-  
TLES ON APPEAL AND PRAECIPE  
THEREFOR

To the Libellant Above Named:

To Robertson, Castle & Anthony, 312 Castle &  
Cooke Building, Honolulu, Hawaii, Proctors  
for Libellant:

To William F. Thompson, Jr., Clerk, United States  
District Court for the District of Hawaii:

The Claimant, Appellant herein, does hereby designate and request that the record on appeal in the above-entitled action shall include the following:

1. The Libel, Interrogatories and Monition, filed October 12, 1948;
2. Stipulation for Libellant's Costs, filed October 12, 1948;

3. Claim of Owner, Young Brothers, Limited, and Release Bond of the claimant and owner, filed October 12, 1948;

4. Answer to Interrogatories, filed November 5, 1948;

5. Findings of Fact and Conclusions of Law, filed June 8, 1949;

6. Decree of District Court filed June 8, 1949;

7. Bill of Costs and Affidavit;

8. Notice of Appeal and Order Allowing Appeal, filed June 18, 1949;

9. Order Authorizing Certified Check in Lieu of Bond, filed June 20, 1949;

10. Bond for Costs on Appeal, filed June 21, 1949;

11. Order Extending Time for Filing of Record on Appeal and Docketing of Appeal, filed July 27, 1949;

12. Citation on Appeal;

13. Assignments of Error Proposed by Appellant;

14. Transcript of the Record of all Proceedings;

15. All of the Clerk's minutes in all matters pertaining to the above-entitled case.

Dated: Honolulu, T. H., this 25th day of August, 1949.

SMITH, WILD, BEEBE &  
CADES

By /s/ J. EDWARD COLLINS,  
Proctors for Appellant.

[Endorsed]: Filed Aug. 25, 1949.

[Title of District Court and Cause.]

### CERTIFICATE OF CLERK

United States of America,  
District of Hawaii—ss.

I, Wm. F. Thompson, Jr., Clerk of the United States District Court for the District of Hawaii, do hereby certify that the foregoing record on appeal in the above-entitled cause, consists of the following listed original pleadings and exhibit of record in said cause:

Libel, Interrogatories, and Monition.

Stipulation for Libellant's Costs.

Claim of Owner.

Release Bond.

Answer.

Answers to Interrogatories.

Bill of Costs and Affidavit.

Findings of Fact and Conclusions of Law.

Decree.

Notice of Appeal and Order.

Order Authorizing Acceptance of Certified Check in Lieu of Bond.

Bond for Costs on Appeal.

Order Extending Time for Filing of Record on Appeal and Docketing of Appeal.

Assignments of Errors.

Appellant's Designation of Apostles on Appeal and Praecipe Therefor.

Citation.

Libellant's Exhibit No. 1.

I further certify that included in said record on appeal is a copy of the court minutes of April 25, 26, May 12, and 23, 1949, and of the Transcript of Proceedings had on April 25, 26, and May 23, 1949.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 20th day of September, A.D. 1949.

[Seal]      /s/ WM. F. THOMPSON, JR.,  
Clerk, United States District Court, District of  
Hawaii.

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In the United States District Court  
For the Territory of Hawaii  
Admiralty No. 409

JOHN CHO,

Libellant,

vs.

THE TUG "KOLO," her boats, engines, machinery,  
tackle, etc.,

Respondent.

### TRANSCRIPT OF PROCEEDINGS

The above-entitled matter came on for hearing at 9 o'clock a.m., April 25, 1949, in the United States District Court, Honolulu, T. H.

Before: HON. J. FRANK McLAUGHLIN,  
Judge.



Appearances:

J. EDWARD COLLINS, Esq.,  
SMITH, WILDE, BEEBE, and CADES,  
Proctors for Claimant.

WILLIAM F. QUINN, Esq.,  
ROBERTSON, CASTLE, and  
ANTHONY,  
Proctors for Libellant.

April 25, 1949

The Clerk: Admiralty No. 409, John Cho, Libellant, vs. The Tug "Kolo," her boats, engines, machinery, tackle, etc., Respondent, for trial.

Mr. Quinn: Ready for the Libellant, your Honor.

Mr. Collins: Ready for the Libellee, your Honor.

The Court: Very well, the parties indicate that they are ready. Is there an opening statement from you, Mr. Quinn?

Mr. Quinn: Yes, if the Court please, I would like to call the Court's attention to the number of the allegations of the Libellant which are admitted in the Answer, and also certain matters in the Interrogatories, which were likewise disclosed by the Respondent.

The Court: I have read them, but I haven't correlated them. Just what is the significance of these admissions?

Or, perhaps first you want to review them.

Mr. Quinn: I would like to, if the Court please. I would like also to ask the Court's indulgence; we



have three or four witnesses here who I do not believe are in full and proper attire in the sense of coats and ties.

The Court: That will be all right. My point is, I want people to realize when they come into this Court, they are not coming into police court; or, in fact, they shouldn't go to a police court that way. It is not a picnic we are having here, and I want them to show proper respect, not for me, but for the Court, and I am sure you understand and agree.

Mr. Quinn: The first paragraph of the Libel alleging ownership of the Libellant was not admitted.

The second paragraph——

The Court: Just a minute. The first paragraph of the Libel, alleging ownership of the sampan, was not admitted?

Mr. Quinn: That is correct, your Honor.

The second paragraph was admitted by paragraph 2 of the Answer; that is, that the Kolo is a tug of a particular description and that it is owned by Young Brothers, a Hawaiian corporation.

Paragraph 3 of the Libel was likewise admitted, which alleged that on April 3, 1948 the Tenyo Maru, a sampan, went aground on a reef off Molokai, and that on April 6 the tug Kolo and the tug Mahoe, also owned by Young Brothers, towed the Tenyo Maru off the reef and into the harbor at Kaunakakai.

Paragraph 4, likewise admitted, stated that the Tenyo Maru, during the night of April 6, remained at Kaunakakai and had a rip in her bottom and

could not be patched either from the inside or outside at Kaunakakai, and a pump was manned to keep the vessel dry during the night; and the Captain of the Kolo came aboard the Tenyo Maru to advise and assist the Libellant with respect to the condition of the damaged vessel. That is likewise admitted in Paragraph 4 of the Answer. [2\*]

Paragraph fifth—

The Court: Excuse me. We might as well take it up now. I gather from Mr. Collins' uneasiness that he doesn't fully agree.

Mr. Collins: If your Honor please, I don't know whether it is proper to interrupt Counsel. I prefer not to do it, but I think there are some inaccuracies in his statement of admissions. I believe the pleadings speak for themselves. We have admitted some of the portions that he specifies, and others of them we have no information or belief on which to form an opinion.

The Court: Admitted in part?

Mr. Collins: Yes, your Honor.

Mr. Quinn: I should like to call the Court's attention to one particular allegation which I think brought that rise out of Mr. Collins.

In Paragraph 4 it states: "The Captain of the Kolo came aboard the Tenyo Maru to advise and assist Libellant with respect to the condition of the damaged vessel. The admission, as I recall it was stated in this statement of paragraph 4 of the Answer, that it further admits that the Captain of

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\* Page numbering appearing at top of page of original Reporter's Transcript.

the Kolo went aboard the Tenyo Maru at the pier at Kaunakakai to ascertain her condition. To that extent they might differ; I will agree with Mr. Collins, it will speak for itself.

Paragraph fifth of the Libel states that about noon on [3] April 7 the Kolo took the Tenyo Maru in tow, the latter retaining a crew of three aboard to man the pump and keep up with leakage. And between Molokai and Oahu the damaged sampan Tenyo Maru began to take water in excess of the capacity of the pumps, and sometime thereafter the decks were awash, the Kolo cut the tow lines, and proceeded to pick up the crew of the sampan.

In somewhat different language Paragraph fifth of the Answer admits the substance of these allegations, except that it denies anything not admitted and calls for strict proof.

An examination of the two, I think, will reveal that the allegation not admitted would be the conclusion of the known unseaworthiness of the vessel.

The Court: Is this an instance of the art of admiralty where you both talk of the vessel's being awash but neither of you mention its being sunk?

Mr. Quinn: That is very material to the case for the Libellant.

The Court: I take it it did sink.

Mr. Quinn: We cannot show that it did and, on the contrary, one element of our case will be that it did not sink at the time of the cutting of the tow line and could have been towed into Honolulu.

Paragraphs 6 and 7 of the Libel, dealing with the amount of damage and with the conclusions with

respect to the liability [4] of the Respondent, are, of course, denied.

Paragraph eighth, the jurisdiction of this Court, admiralty and maritime jurisdiction, is admitted.

Paragraph ninth, containing a routine recitation that the premises are true and within the jurisdiction, is admitted, except for the truth of the allegation.

In the Interrogatories the certain repetitious admissions were made. The ownership of the Kolo by Young Brothers was admitted.

In Paragraph 2, in response to a question: "On said date who operated said tug?" Young Brothers has replied that Joseph Kahiapo was the master of the tug.

And in response to Interrogatory No. 3, concerning the hour when the tug took the Tenyo Maru in tow, it was responded: at 12:15 p.m.

In response to Paragraph 4—to Interrogatory 4: "Did the person operating said tug know that the aforesaid sampan had a rip in her bottom at the time she was taken in tow?" the answer is in the affirmative.

Paragraph 5: "What was the prevailing wind on that day?" The answer is "Normal trade."

"At what hour did said tug and said sampan enter the Molokai Channel?" The answer is 1:45 p.m.

The Claimant, Young Brothers, then affirms it has no knowledge of the speeds and conditions in the channel, and in response [5] to Interrogatory

11: "At what hour did the person operating said tug learn that said sampan was taking water badly?" it is replied: 3 p.m.

In response to the question: "What action did said person take upon learning of the sampan's difficulty as aforesaid?" it is stated that they abandoned the tow and picked up the crew, and that this was one and a half hours from Laau Point, or eight or ten miles, Laau Point being the point on Molokai closest to Oahu.

In response to Interrogatory 14: "At what hour did the captain of the Kolo order that the towline be cut?" the answer is: Between 3 and 3:30 p.m. And, in response to Interrogatory 15, that that occurred in about the middle of the channel; and the deck log of the Kolo is then annexed to the Interrogatory.

It is the view of the Libellant, if the Court please, that the Tenyo Maru was unseaworthy when in the port of Kaunakakai; that her unseaworthiness was known to the master of the Kolo; that when the master of the Kolo took the Tenyo Maru in tow, knowing it to be unseaworthy, and towed her into the middle of the channel, whereupon she was cut loose, he was liable, and the Kolo was liable for a maritime tort; that the allegations of the Respondent in the Answer with respect to the authority of the master are immaterial in so far as this is an admiralty action in rem against the noxal instrument so-called; and so long as the person in charge of that vessel is in rightful [6] possession, the vessel



will be liable, irrespective of actual or apparent, or other authority in the master. And, additionally, if the Court should find that that is not true, it is our position that there was authority in the master of this vessel.

It is likewise our position that the Kolo failed to take proper steps to salvage or to save the Tenyo Maru when she began to take additional water in the channel; that in cutting the tow line without making some efforts to continue the tow, the master of the Kolo was negligent in a maritime sense and failed to take due and proper care of its tow; and, as a result of that action, the tow was lost when it need not have been.

The Court: I still would like to know why neither of you admit that the thing sank. It may not be material, but from the standpoint of my education, why don't either of you mention that the thing went to the bottom?

Mr. Quinn: As far as I know, your Honor, I suppose it did at some time, but it did not within the knowledge or notice of the master of the Kolo or of the master of the Tenyo Maru.

The Court: That is something that neither of you actually know?

Mr. Quinn: We will endeavor to show that it would not have sunk, if the Court please.

The Court: All right. That completes your opening statement? [7]

Mr. Quinn: Yes, your Honor.

The Court: Mr. Collins?

Mr. Collins: I would like to reserve my statement, if your Honor please, until the conclusion of the Libellant's case.

The Court: Very well. You may call your first witness.

Mr. Quinn: Sam Kalani, Jr.

The Court: I will ask that you all bear with me in case there are nautical terms utilized by the lawyers and witnesses and educate me as we go along.

Mr. Quinn: May we ask that the Court bear with the Libellant on the same ground.

SAMUEL KALANI, JR.

called as a witness on behalf of the Libellant, being first duly sworn, was examined and testified as follows:

The Clerk: Sit down, please.

The Court: Will you please state your name, age, residence, occupation and citizenship, and talk loud and distinctly.

The Witness: Well, my name is Samuel Kalani, Jr.

The Court: Just a minute. That is spelled (spelling) K-a-l-a-n-i?

The Witness: (Spelling) K-a-l-a-n-i.

The Court: Jr. [8]

The Court: Your age?

The Witness: January 4, 1924.

The Court: You were born in 1924?

The Witness: Yes.



(Testimony of Samuel Kalani, Jr.)

The Court: Where do you live?

The Witness: 517 Keawe Street.

The Court: Here in Honolulu?

The Witness: Yes.

The Court: What is your occupation?

The Witness: Fisherman.

The Court: Employed by anyone? Are you employed by anyone?

The Witness: Used to be by John Cho.

The Court: Aboard his ship or vessel——

The Witness: Yes.

The Court: The name of which was what?

The Witness: Tenyo Maru.

The Court: And are you a citizen of the United States?

The Witness: Yes.

The Court: Only?

The Witness: Yes.

The Court: Are you sure of that?

The Witness: Yes.

The Court: All right. Have you ever been a witness [9] before?

The Witness: No.

The Court: Have you ever been in court before?

The Witness: No.

The Court: You appear to be quite scared. There is no reason for being scared. Just listen to the questions the lawyers put to you and reflect on what the true answer is, give it as best you can in a clear, distinct tone of voice so that everyone can hear you.

(Testimony of Samuel Kalani, Jr.)

Mr. Quinn.

Mr. Quinn: Thank you, your Honor.

Direct Examination

By Mr. Quinn:

Q. Sam, were you employed by John Cho on or about the first part of April, 1948?

A. Yes, sir.

Q. Will you speak up so I can hear you.

A. Yes, I was.

Q. That's fine. And what was your position with respect to the Tenyo Maru?

A. Captain of the boat.

Q. You were captain of the Tenyo Maru.

The Court: Excuse me. I have inferred that the man sitting beside you is John Cho.

Mr. Quinn: That is correct, your Honor. [10]

Q. (By Mr. Quinn): Sam, on about April 3 of last year did the Tenyo Maru have some trouble?

The Court: The question was: Did the Tenyo Maru, to your knowledge, on April 3, 1948, have some trouble?

The Witness: No, no trouble at all.

Q. (By Mr. Quinn): On or about the third of April did you make a trip in the Tenyo Maru up to Molokai? A. Yes.

Q. Was there anything unusual that happened on that trip?

A. Well, on the way over there something happened on the reef.

Q. You went on the reef? A. Yes.

(Testimony of Samuel Kalani, Jr.)

Q. How did that happen, Sam?

A. Well, as I was going into Kaunakakai, I was taking my range light on my way in. I was probably close to the pier, and there was a boat in there; probably it was the Adventure.

The Court: That is the name of that other vessel?

The Witness: Yes.

Q. (By Mr. Quinn): The other vessel in this case?

The Court: The one he described as being somewhere when he was going in.

The Witness: She had her running lights, everything was on. There was a tug boat coming out, so I gave her a little [11] room, and I don't know, just went on the reef.

Q. How did you try to get off the reef, Sam?

A. I tried to back it out, tried with my outboard motor. I had a little outboard motor on. Couldn't do anything.

Q. Did you ever get the Tenyo Maru off?

A. No.

Q. Did anybody ever get it off?

A. No. Just, I guess it was on the sixth, April 6, when the Mahoe pulled it off.

Q. The Mahoe pulled it off; is that right?

A. I forget the tug's name.

The Court: What is bothering you? The dates? Is that what is bothering you? Is it the date that is bothering you, as to whether it is April 6 or 7 or 3? You don't remember the date; is that it?

(Testimony of Samuel Kalani, Jr.)

Mr. Quinn: Well, the dates are stipulated, if the Court please, so I will try not to stir up sand here.

Q. (By Mr. Quinn): A couple of days after you went on the reef, were you towed off by tugs, or what?      A. Yes.

Q. And where did they take you, Sam?

A. To Kaunakakai, close to the pier.

Q. And when you got to Kaunakakai, what condition was the Tenyo Maru in?

A. She was—she had about one foot and a half damage [12] under her hull.

The Court: Just a minute.

Q. (By Mr. Quinn): Whereabouts on the hull?

The Court: Right under the hull?

The Witness: Right under where the motor is.

Q. (By Mr. Quinn): Right under where the motor is?      A. Yes.

Q. Is that toward the bow or toward the stern?

A. I guess it was right in the middle of the boat.

Q. Was the Tenyo Maru taking water?

A. Yes, she was taking—she was taking water and probably had a pump on him, too, tried to pump the water out the best way they could, and from then on we tried to tow it back to Honolulu.

Mr. Quinn: Sam, this lady has to take down everything you say, so you speak slowly and loud so she can understand.

Mr. Collins: If your Honor please, loud enough so we can hear.

The Court: Yes, and I want to hear, too. And,

(Testimony of Samuel Kalani, Jr.)

Sam, don't run your words together. You know what happened, but we don't, and the only way we can find out is from you and others who were there.

The last I knew was that this tug took the Tenyo Maru off the reef and towed it to the pier at Kaunakakai, and that there was a foot and a half of damage to the Tenyo Maru's hull under [13] the motor, about the middle, and she was taking water; and there was something about a pump. After the pump I didn't get what he said.

Q. (By Mr. Quinn): Will you tell the Court, Sam, what you did about the water that was coming in through the damaged hull?

A. On the boat we had a water pump, you know.

The Court: Water pump?

The Witness: Water pump, which was pumping out, and we had a hand pump also. One of my boys was pumping with the hand pump. The other one was with the water pump.

Q. (By Mr. Quinn): You had a motor driven pump and a hand pump?

A. Yes, and a hand pump.

Q. During that night when you were in Kaunakakai, were those pumps enough to keep up with the water coming in?

A. Yes, it was.

Q. During that night, Sam, did you try to fix up the damaged hull at all?

A. I tried and cannot.

Q. Why?

A. Because she was under the motor.

(Testimony of Samuel Kalani, Jr.)

Q. Under the motor? A. Yes.

Q. In a position where you couldn't get to it from the [14] inside?

A. Yes. Couldn't even get in there.

Q. How about the outside?

A. The outside was in the water.

Q. It was under water and there was no way you could repair it under water; is that right?

A. Yes.

Q. Was the tug Kolo at Kaunakakai that night?

A. Yes, she was.

Q. Who was the captain of the Kolo, do you know?

A. Well, I know his first name is Joe.

Q. Did the captain of the Kolo come on the Tenyo Maru? A. Yes, he was, tried to help.

Q. Tried to help, see if he could get behind the engine, is that right? A. Yes.

Q. Did you talk to the captain of the Kolo about towing you back to Honolulu? A. No.

Q. When were you started on your tow back to Honolulu? A. April 7.

Q. The next day? A. Yes.

Q. At about what time?

A. Just about noon, I guess. [15]

Q. About noon. Will you tell the Court, Sam, what happened as you started on your tow out into the Molokai Channel.

A. From Kaunakakai, from the pier we start off, and we came to, I guess it was about 15 miles



(Testimony of Samuel Kalani, Jr.)

from Kaunakakai. Before then she was—my pump was keeping up with the water, which she was all right.

Q. Slower, now, Sam.

A. (Continuing): It was also windy, pretty rough.

The Court: What?

The Witness: It was windy and pretty rough.

The Court: Windy and rough?

The Witness: Yes.

A. (Continuing): So can't keep up with that water no more, so she start to lower down. The boat went down a little. Each time we went, she went down a little.

The Court: Just go back there a minute.

Q. (By Mr. Quinn): And then what happened, Sam? Speak up so I can hear you back here.

A. So each time she went down, then the water start to catch my water pump. We can't pump no more. The water was right below the gunwale of the boat. Then from then on I called captain of the Kolo, just wave at him because it was a pretty long distance from where he was up to my boat. He didn't even see me wave at him, so from then on he just cut his rope off.

Q. Did you say Sam, that when the water came up to about [16] the gunwales—Is that the same thing as the sponsons, the pieces that stick out on a sampan? A. Yes, the same.

Q. When the water came up to about there, you waved to the captain of the Kolo; is that right?



(Testimony of Samuel Kalani, Jr.)

A. Yes.

Q. And the captain of the Kolo, did he respond in any way?      A. No.

Q. What did he do?

A. Just do nothing at all, just cut his rope.

Q. He just cut his rope?      A. Yes.

Q. Then what happened to you?

A. Well, from then on he came close to where we were and we swam to the tug.

Q. You swam to the tug?      A. Yes.

Q. Then what did the Kolo do?

A. She just came alongside and took us on, and we came toward Honolulu.

Q. You came to Honolulu?      A. Yes.

Q. Where was the Tenyo Maru?

A. She was there floating in the water there.

Q. With water up to the gunwales?

A. Yes.

Mr. Quinn: No further questions.

#### Cross-Examination

By Mr. Collins:

Q. How long were you captain of the Tenyo Maru?      A. About three years.

Q. Two years?      A. About that.

Q. Were you on the Tenyo Maru when she was being pulled off the reef?      A. Yes.

Q. Was the pump going then?

A. Well, we started our pump when she was at the pier.

Q. Was the pump going when she was on the reef?

(Testimony of Samuel Kalani, Jr.)

A. On the reef we had no pump at all, until we pulled it to the pier.

Q. Did you have the gasoline—The pump was a gas pump?      A. Yes.

Q. Did you have that on board when you were on the reef?      A. No.

Q. Did you have the hand pump on board when you were on the reef?      A. Yes, we have.

Q. Were you working the hand pump at all?

A. Yes.

Q. When the Tenyo Maru was being pulled from the reef to the pier, were you working the hand pump?

A. The hand pump and the gasoline pump also.

Q. Now, this hull damage that you spoke of, did you go down and look at it?      A. Yes.

Q. Did you go under the engine?

A. No, you can't go.

Q. Then how were you able to see how much damage there was?

A. You could see right through the engine where she was sitting; you could see that damage.

Q. The engine was not over the break in the hull?

A. She was over the break of the hull, but then I put my head under the motor and looked at the damage.

Q. How much water was there in the Tenyo Maru when she was at the pier?

A. Probably she had no water at all, because we had a pump working then.

(Testimony of Samuel Kalani, Jr.)

Q. Well, with the pump working, how much water was there in it?

A. She has only about one foot, I guess.

Q. One foot. You mean when she was pulled in off the reef and up to the pier there was only one foot of water in it? [19]

A. No; that is when the pump was working.

Q. When you say there was only one foot, when was there only one foot?

A. When we came to the pier, from the reef to the pier, she has quite a load of water in it, about half way, I guess.

Q. With this hand pump you spoke of, did you and your men have to keep working it all the time?

A. Yes.

Q. It is a question of pulling a lever; is that right? A. Yes.

Q. Where was that pump located?

A. Right where the cabin is.

Q. Is that on the main deck? A. Yes.

Q. When did you start the gas pump going?

A. As soon as we came at the pier.

Q. How much water was there in it before you put the gas pump on it?

A. Oh, she was, about, quite a way up the boat.

Q. How much?

A. About four or five foot.

Q. Three or four feet. And when did it go down to one foot?

A. That is when we start to pump the motor.

(Testimony of Samuel Kalani, Jr.)

Q. As soon as you started the gas pump going, it went [20] down to one foot? A. Yes.

Q. Was the gas pump going all night?

A. Yes, all night.

Q. Were you on board all night? A. Yes.

Q. Did you leave to go for chow any place?

A. No.

Q. You got your chow on board?

A. Yes.

Q. When you saw this damage in the hull, how much water was there there?

A. Well, you see, the boat was one side a little so this one foot of water—probably on one side of the sampan you could see that damage.

Q. Was the hole right down at the bottom?

A. No. In the middle of the boat, quite on the side.

Q. Was the hull above the water in the boat or below the water in the boat?

A. You mean the hull?

Q. Yes. But was the water inside the hull higher than the break in the plank or was the water in the hull below it? A. Below.

Q. It was below it, you say? A. Yes. [21]

The Court: Excuse me. It may not be material, and yet it may be. Sometimes you talk of damage to the hull and other times talk about a hole in the hull. I don't know whether it was a real hole or whether it was a crack or an opening of the seams. Perhaps it may be significant to find out.

(Testimony of Samuel Kalani, Jr.)

Q. (By Mr. Collins): Suppose you tell us just what this hole looked like.

A. It was just about a foot and a half. She was wide, oh, about three inches wide.

Q. Well, is that a plank that had torn out of there? A. Yes.

Q. About three inches wide, you say, and about a foot and a half long? A. About.

Q. Was the hand pump going at the same time the gas pump was going, when she was at the dock?

A. Yes.

Q. Was it necessary to keep both of them going?

A. Yes.

Q. The hand pump was going all night?

A. Yes.

Q. How many men were on board the ship?

A. Three of us.

Q. Did you work the pump? A. Yes. [22]

Q. How long did you work it?

A. Well, we had a shift every hour.

Q. You mean you worked it for an hour and then someone relieved you? A. Yes.

Q. But it was working all night long?

A. All night.

Q. Did the gas pump stop at all? A. No.

Q. And you say that as soon as the gas pump started, the water went down from four feet to about a foot? A. Yes.

Q. And it stayed that way all night with both pumps going? A. All night.

(Testimony of Samuel Kalani, Jr.)

Q. Did you make any attempt to patch it?

A. Yes, we tried and couldn't get it.

Q. Did you try to patch it on the outside?

A. You can't.

Q. What attempt did you make to patch the inside?

A. See, we can't do nothing, so we just let it go.

Q. You didn't actually do anything, did you?

A. Yes.

Q. Did you talk to—Was Mr. Cho there?

A. Yes. [23]

Q. Did you talk to him at all about how it should be fixed up?      A. We tried, talked.

Q. Did you talk to him about having it brought to Honolulu?      A. No.

Q. He didn't say anything to you about it, and you didn't say anything to him about it?

A. He told me something; he said, "Bring the boat over."

Q. Did you tell him anything about its condition?      A. Yes.

Q. What did you have to say about it?

A. Oh, just told him that the boat, how the damage is, so he went down and he looked at it.

Q. When did he tell you that he was going to take it here?

A. As soon as we got it off the reef.

Q. Before it got to the pier?

A. Just when we got to the pier, April 6. That is when we took the boat off. April 7 is when the boat got——

(Testimony of Samuel Kalani, Jr.)

Q. I don't understand you.

A. April 6 when they pulled the Tenyo Maru off the reef and April 7 we left over there.

Q. I know, but when did Mr. Cho first tell you he intended to bring the boat here? [24]

A. Well, as soon——

Q. Well, was that while it was on the reef?

A. No.

Q. When did he tell you?

A. He told me just get the water off so much and pull that boat back to Honolulu.

Q. Was that when it was at the pier?

A. Yes.

Q. Was it that night or the next morning?

A. Morning.

Q. The next morning. Did you say anything to him when he suggested that the sampan be towed to Honolulu? Did you say anything about whether it would be able to stay above water or not?

A. No.

Q. He didn't ask you whether it would or not?

A. No.

The Court: I take it by inference that Mr. Cho, the owner of the boat, apparently, according to the allegation, was one of the three men aboard this vessel all of the time?

Mr. Quinn: I don't think so, your Honor. I think the proof will come out very shortly. Mr. Kalani was master and had two crewmen. Mr. Cho,



(Testimony of Samuel Kalani, Jr.)

in fact, came up there after the boat went on the reef.

The Court: Well, Mr. Collins and the witness were [25] just talking about the situation when the Maru was on the reef, and I gathered that Mr. Cho was aboard the vessel when it went aground.

Mr. Quinn: He got up there and got aboard after it went aground. It is true he was on the Tenyo Maru while it was on the reef. That will come out shortly.

Mr. Collins: I believe it was on the reef a couple of days, your Honor.

The Court: Oh, I see.

Q. (By Mr. Collins): Did the gasoline pump stop at all during the night? A. No.

Q. How large a pump is that?

A. Really I don't know how large it is.

Q. Do you know how many horsepower it is?

A. No, I don't.

Q. Is it part of the sampan's equipment?

A. No.

Q. It was brought on board the sampan at Kaunakakai, was it? A. Yes.

Q. Where was it put?

A. Right in front of the bow.

Q. On the main deck? A. Yes. [26]

Q. And you just ran a line down into the hull, is that it? A. Yes.

Q. Did you suggest to the captain that the pump be brought on board?

(Testimony of Samuel Kalani, Jr.)

A. Yes, I tried to get——

Mr. Collins: I don't hear you.

The Court: He is the captain.

Mr. Quinn: I object, in order to stop it for a moment. He is the captain.

Mr. Collins: Strike the question, please.

Q. (By Mr. Collins): Did Mr. Cho——

Mr. Collins: Strike that.

Q. (By Mr. Collins): Did you ask Mr. Cho to have a gas pump put aboard? A. Yes.

Q. You say the captain of the Kolo was named Joe? A. Yes.

Q. How long had you known Joe?

A. Since when we was in Kaunakakai.

Q. You didn't know him before that?

A. No.

Q. I believe you also said you did not talk to Joe at all about this tow. A. No. [27]

Q. Did you talk to him about the condition of the sampan? A. Yes.

Q. What did you say to him about it?

A. Just told him, What you think about it, can do anything? He said, "no."

Q. Did you say anything about its being able to stand a tow to Honolulu? A. No.

Q. You didn't discuss towing to Honolulu at all?

A. No.

Q. At the time the Kolo took the Tenyo Maru in tow, you knew she was being towed to Honolulu, didn't you? A. Yes.

(Testimony of Samuel Kalani, Jr.)

Q. Did you say anything to Mr. Cho about it?

A. No.

Q. Did you say anything to Joe about it?

A. No.

Q. How many men did you have on board the sampan when she was being towed? A. Two.

Q. Two besides yourself? A. Yes.

Q. That is the regular crew? A. Yes.

Q. Was the gasoline pump working all right that morning? [28] A. Yes.

Q. Was the hand pump being worked that morning, too? A. Yes.

Q. All the time there was a man on the hand pump? A. Yes.

Q. Did the gasoline pump work all the time until the sampan started to go down?

A. Well, as I said a while ago, when we was coming, she was pretty rough and windy, and then on the wave, hit the boat and water on the boat, and the gasoline motor pump, she died off.

Q. Did the gasoline pump actually go under water itself? A. Well, no.

Q. You didn't see it go under water?

A. She went with the boat.

Q. But before you left her, was the gasoline pump under water, or was she still above water?

A. She was above water.

Q. But she wasn't working? A. No.

Q. How long before you left the sampan did

(Testimony of Samuel Kalani, Jr.)

the gasoline pump stop working?

A. You mean how long I left the sampan—I beg your pardon?

Q. Well, how long before you left the sampan did the gasoline pump stop; ten minutes, fifteen minutes? Do you recall [29] how long a period it was?

A. Oh, just about half an hour, I guess, before that when she stopped.

Q. The man was working the hand pump all the time?

A. Yes.

Q. As captain of the Tenyo Maru, you worked at times in this channel, didn't you?

A. Yes.

Q. You have been on board a boat in that channel a number of times; isn't that right?

A. Yes.

Q. You said it was rough there. Was it rougher than usual in that channel?

A. Just about usual, I guess.

Q. Just about usual. Was it any windier there than usual?

A. The wind was pretty strong.

Q. Unusually strong?

A. Yes.

Q. About how strong was it?

A. That I really don't know.

The Court: What?

The Witness: I don't know, really.

Q. (By Mr. Collins): Would you say it was a little bit stronger than usual, or a lot stronger than usual? [30]

A. It was a little stronger.

Q. Just a little stronger than usual. You kept

(Testimony of Samuel Kalani, Jr.)

watching the water in the sampan when you were being towed, didn't you?      A. Yes.

Q. Did you find the water increasing or not when the gasoline pump was working?

A. Well, she was increasing.

Q. Was increasing. Increasing slowly or fast?

A. Fast.

Q. All the time she was coming out the water was increasing fast?      A. Yes.

Q. Did you signal to the Kolo that she was taking on water?      A. Yes.

Q. When did you signal?

A. Oh, about half an hour; the gasoline pump died off and she was taking in water faster than—I started to wave back to the captain of the Kolo.

Q. About half an hour after she left the pier?

A. No; after my gasoline motor died off.

Q. After the pump stopped?      A. Yes.

Q. Did you give any signals to the Kolo before that [31] time?      A. No.

Q. Even though she was taking in water, you didn't attempt to tell them that?      A. No.

Q. Tell me how this hand pump works. Can you describe it?

A. Well, she is just a long stick, a pipe running through the hull.

Q. Is it like an automobile pump?

A. Just so long, pretty long, and she got a round pipe right on the main deck down to the bottom of the boat, which could suck water and pull the hand pump and pump up and down.

(Testimony of Samuel Kalani, Jr.)

Q. Is it like an automobile pump or bicycle pump with handles on it, and you pump up and down?

A. Just a long stick, and you hold the handle of the stick.

Q. Just a stick. Was a man pumping there right up to the time that you went over the side?

A. No.

Q. When did the man stop pumping?

A. As soon when she is giving water and the water was coming in fast, and it is no use to pump with hand pump no more.

Q. Did you stop pumping with the hand pump before or [32] after the gas pump stopped?

A. After.

Q. How long did you pump with the hand pump after the gas pump stopped?

A. About half an hour.

Q. You say there was about a half hour there when neither the hand pump nor the gas pump was pumping?

Mr. Quinn: I don't recall his saying that.

The Court: He didn't actually say that. You are putting some things together.

Q. (By Mr. Collins): Well, was there any period when neither of the pumps were pumping?

A. Well, as soon as she was taking water in fast, then from then we didn't use the pump no more, so we didn't pump.

Q. How did you signal to the tug?



(Testimony of Samuel Kalani, Jr.)

A. Just wave at them.

Q. Did you shout anything to them?

A. No, you can't shout because they can't hear you.

Q. How long a line was out?

A. Oh, it was about twenty to thirty fathom.

Q. How long?

A. Twenty to thirty fathoms.

Q. Twenty fathoms?

A. To thirty fathoms.

Q. Twenty to thirty fathoms. [33]

The Court: That is the length of the tow line?

Mr. Collins: Yes.

Q. (By Mr. Collins): And do you know how long a fathom is, how many feet? A. Yes.

Q. How many feet is it? A. Six.

Q. Did you have a megaphone on the Tenyo Maru? A. No.

Mr. Collins: I believe that is all.

The Court: Redirect?

### Redirect Examination

By Mr. Quinn:

Q. While you were in Kaunakakai, after you had come off the pier, how many pumps did you have going?

A. Had gasoline pump and hand pump.

Q. And were those pumps able to keep up with the water coming in through the damaged hull?

A. Yes.

Q. And when did the water start catching up or beating the pumps, Sam?



(Testimony of Samuel Kalani, Jr.)

A. In the channel when she was——

Q. When you first entered the channel?

A. It was in the channel already.

Q. In the channel? [34] A. Yes.

Q. Did the water come in faster than you could pump while the gas pump was working?

A. Well, she could really pump fast enough, but, as I say, it was pretty rough, wind, a little *while* came on the boat and touched my gas motor, and she died off, and from then on the water came in faster.

Q. And that was about a half hour before you stopped pumping with the hand pump?

A. Yes.

Q. You stopped pumping with the hand pump why?

A. Because it is no use, because you can't keep up with the hand pump.

Q. When you first got into the channel, your pumps were still keeping up with the water coming in; is that right? A. Yes.

Q. Now, Sam, did the spray start affecting the operation of your pump before you started to go down somewhat because of additional water or after you started to go down because of additional water in the hull?

A. Before. Gradually she was going down, so it starts getting lower, so spray come on the boat.

Q. The hull started gradually going down; after it went down somewhat, then the spray started coming over and affecting the pump; is that right?

A. Yes.

(Testimony of Samuel Kalani, Jr.)

Q. And the hull was going down because it was taking more water than it had before; is that right or wrong?      A. Right.

Q. What was the condition of the Tenyo Maru at the time you first signaled the Kolo?

A. She was right on her gunwales, and from then on I signaled the Kolo. Was floating on the water.

Mr. Quinn: No further questions.

Recross-Examination

By Mr. Collins:

Q. Was any part of the main deck under water?

A. No.

Q. The stern was not under water at all?

A. No.

Q. Did you have any canvas of any sort protecting the pump?      A. Yes.

Q. How did you have your canvas set up?

A. Well, you can't put the canvas under because probably she was down a little, just a small little canvas.

Q. You didn't have any canvas covering the entire pump?      A. No.

Q. How large a piece of canvas did you have? Was it as big as that table? [36]

A. Just a little bigger.

Q. Was it as big as this table the girl is writing at? About that size?

A. It is a little bigger. About that size (indicating).

(Testimony of Samuel Kalani, Jr.)

Q. About this size? (indicating). How big is the pump?

A. About this wide (indicating).

Q. Did you have the canvas thrown on top of the pump?      A. Yes.

Q. You said that you were captain of the Tenyo Maru for a couple of years.      A. Yes.

Q. Do you know a Walter Paula?

Mr. Quinn: I object, your Honor; improper re-cross-examination.

The Court: It seems to be new matter.

Q. (By Mr. Collins): Were you registered as the master of the Tenyo Maru at the time she went on the reef?      A. No.

Q. You were?      A. No.

Q. You were not. Who was the registered master, do you remember?      A. No.

Mr. Collins: That is all.

Mr. Quinn: No further questions. [37]

The Court: You are excused.

(Witness excused.)

The Court: We will take a short recess.

(Recess had.)

Mr. Quinn: Will you take the stand.

### JOHN Y. K. CHO

called as a witness on behalf of the Libellant, being first duly sworn, was examined and testified as follows:

The Clerk: Just sit down, please.

(Testimony of John Y. K. Cho.)

The Court: Please state your name, age, residence, occupation, and citizenship.

The Witness: John Y. K. Cho; age 23; have a fish market, wholesale and retail; and am a citizen of the United States.

The Court: And you live in Honolulu?

The Witness: Yes.

The Court: Take the witness.

### Direct Examination

By Mr. Quinn:

Q. Mr. Cho, were you the owner of the sampan known as the Tenyo Maru?

A. Yes, sir, I am the owner of the sampan, the Tenyo Maru.

Q. That is the vessel that was involved in the incident of going on the reef and the subsequent towage that you have [38] heard testimony about?

A. Yes, sir.

The Court: Incidentally, and wholly irrelevant, what does Tenyo mean?

The Witness: It means something like a blue sky in Japanese.

The Court: Thank you.

Mr. Collins: I am glad you asked that, your Honor. I have also wondered.

Q. (By Mr. Quinn): How long have you been a fisherman, Mr. Cho?

A. Got out of the Navy in '45, and fishing the beginning of '46.

Q. And when did you first acquire the ownership of the Tenyo Maru?

(Testimony of John Y. K. Cho.)

A. In August of 1946.

Q. How did you use the Tenyo Maru after that?

A. I used the Tenyo Maru as a fishing boat, going out for ahi and sword fish, commercial fishing boat.

Q. How long did it go out in a stretch?

A. It would go up to ten to fifteen days in a stretch.

Q. Can you tell the Court approximately what the monthly yield from fishing in the Tenyo Maru was?

A. You mean how much it would bring me a month?

Q. Yes, net. [39]

A. The net would be—four months I made \$3800; that is net on that boat. It is approximately \$900 a month.

Q. And what about the other eight months of the year?

A. The other eight months you make about \$600 a month, because the boat goes out about twice a month, and a share is 35 per cent, bringing just about five hundred, six hundred. Bad months bring in about two hundred.

Q. Do you remember when the Tenyo Maru left on the voyage where she subsequently went on the reef at Molokai?

A. I don't remember the exact date, but it was about the beginning—the ending of March or the beginning of April. I don't quite remember.

(Testimony of John Y. K. Cho.)

Q. She was going on a fishing trip?

A. Yes, sir.

Q. When did you first hear that she had gone on the reef?

A. I heard it Sunday when my sister received a call from Kalani—from the Coast Guard—that my ship was on the reef.

Q. Was that the day that it had gone on the reef?

A. The day after.

Q. The day after?

A. Yes.

Q. And what did you do?

A. I went over to the Young Brothers, and I talked to Mr. Harrison about that, and I talked to Mr. Pavao, the port [40] captain, and at that time Joe Kahiapo dropped in, and he said he was going to Molokai the next morning. So Mr. Pavao and Mr. Harrison—I talked to Mr. Harrison, and Mr. Harrison told Joe to do whatever he can; the same thing Mr. Pavao.

Q. And that was on Sunday?

A. Afternoon.

Q. Afternoon.

A. Yes.

Q. In Honolulu?

A. That's right.

Q. And then what did you do?

A. So I made reservation to catch the next plane to Molokai, got there eight o'clock plane, chartered a plane and flew to Molokai, my brother-in-law and I.

Q. Your brother-in-law and you?

A. Yes.

Q. What did you do when you got there?



(Testimony of John Y. K. Cho.)

A. We made arrangements that Joe would meet me at Kaunakakai Harbor at 2 o'clock that afternoon, Monday afternoon; and we met there, but they couldn't do anything.

Q. Excuse me a minute. You got up there Sunday night?

A. No. Monday morning.

Q. You arrived Monday morning?

A. Yes, sir.

Q. And did you go out to the Tenyo Maru? [41]

A. Yes, I went out to the Tenyo Maru.

Q. That morning?           A. That morning.

Q. What was the condition of the Tenyo Maru when you got there? Describe where it was on the reef and that sort of thing.

A. It was about—it was right on the reef, and it was filled with water from that hole on the side, port side, midship. It was there, and I couldn't get at the leak. I worked on it, put calking on the outside wherever I could reach, and I couldn't get to it from the inside, because it was right below the fuel tank.

Q. Well, will you describe to the Court where the location was from the inside, and describe the situation in the engine room and why you couldn't get down there from the inside.

A. Well, the sampans, they have two fuel tanks on each side of the ship, see, midship, and the leak was on the port side, midship, right on the corner there. That is where a big rock was beating against



(Testimony of John Y. K. Cho.)

it. That is what caused that foot and a half leak there. So the fuel tank on the inside, it was too big, and you have to break up the whole thing to get to it, which was kind of impossible out there, because they didn't have the facility to move anything. And I tried my best to get under there, but the bottom of the tank was something like [42] this (indicating), and the leak was on the inside, you know, between the tank and the side of the ship.

Q. About how much room is there between the bottom corner of the tank and the inside hull of the ship?

A. Well, more or less comes—that is, where the break comes down the side you couldn't get at it because they have got those ribs coming across, and pretty impossible to get there because so small room to work from and all those pipes and the shafts gets in your way.

Q. And why couldn't you calk it from the outside?

A. Couldn't calk it from the outside because the big boulder on the side of it that beat the ship up would cause rocking as soon as the wave come, so I had to dive down and put in some calking and beat it, and the next wave come I would have to pull back; and kept on doing that, whatever I could see.

Q. Did you meet Joe—Who is Joe Kahiapo?

A. Joe Kahiapo is a captain of the Tug Boat Kolo.

Q. Did you meet him at 2 o'clock in Molokai?

(Testimony of John Y. K. Cho.)

A. Yes, I met him at 2 o'clock in Molokai.

Q. What transpired at that time?

A. Well, he said that he had to go—he couldn't do anything now because the tide was low, so he said he was going to Kolo, and I believe he said he was going to pick up a barge or something and then come back that afternoon again. [43]

Q. Monday afternoon? A. Yes.

Q. Go ahead. Did he?

A. And he came back—sort of vague.

The Court: Vague?

Mr. Quinn: He is just trying to recollect.

The Witness: Joe came and went back to Kolo, I believe.

The Court: Kolo; that is the name of the tug.

The Witness: And it is the name of a port. And he said he couldn't pull the boat off because of the tide, and he would pull it off when he comes back; the tide might be up again.

Q. (By Mr. Quinn): And what day would that be? A. That would be the same day.

Q. Monday or Tuesday?

A. Monday. Then what I did was get a water pump—I borrowed a water pump from the City and County of Molokai, and I pumped all the water out, you know, to get it loose, you know, bring the boat up. By the way, I took the pump out with a skiff and pumped the water out, and we had buckets bailing water also.

Q. You were trying to lighten the boat so you might float it off the reef; is that right?

(Testimony of John Y. K. Cho.)

A. That's right. I don't remember what day it was, but the Mahoe——[44]

Q. What is the Mahoe?

A. The Mahoe is a bigger tug boat than the Kolo, owned by Young Brothers. The Kolo tried to pull it off first. It was rigged up but couldn't pull it off. So they had the Mahoe at the front, more or less a double tug, you know, and they finally pulled it off, and the water pump was working up to the time when we got to Kaunakakai Harbor. The men worked on the pump, kept on running it. And I dived down from the side to see whatever patch I could give him, but the hole was below the water line, see, so I couldn't get to it, and the water was dirty, too, from the tug boat tugging in there and stirring up all the harbor water. It is more or less clay water. And that night the pumps was running right through; and I called up Young Brothers the next morning, and Pavao gave me all the prices on the towing, said that the Mahoe would cost \$50 an hour and the Kolo would cost \$35 an hour.

Q. And that night did you talk to Joe Kahiapo at all about how you could repair the Tenyo Maru?

A. Joe knew about the hole there, and he saw me diving under to check the leaks and to check the leak from the inside, and I guess he more or less took it for granted that it was pretty near impossible——

Q. That it was what?

A. That it was pretty near impossible to get at

(Testimony of John Y. K. Cho.)

the hole. I had that big CPC crane lift up my boat, yet couldn't [45] because it was too heavy.

Q. So how did you arrange to have the Tenyo Maru taken under tow from Kaunakakai?

A. Well, I wanted to call Young Brothers. I told Joe, and Joe told me, no, from here on he is taking over; he is more or less taking over responsibility of the towing, see, once he has that line on. So more or less Joe took responsibility on having the boat towed back to Honolulu.

Q. And when did he start to tow?

A. He started to tow—his men rigged up the towing——

Q. This was the day after you had been pulled off the reef?

A. His men put on this barrel, this big 55 gallon drums on the port side of the back and they rigged up 8-inch line, I believe, right around.

Q. Were your fuel tanks full or empty at the time they took the Tenyo Maru under tow?

A. My fuel tanks wasn't quite full, though, because it made that trip and more or less it was about half on both sides.

Q. Did you go on the Tenyo Maru when it was under tow?      A. No, I did not.

Q. Were you there until it left?

A. Yes, I was there until it left.

Q. Did it still have the pump aboard, the gasoline pump, when it was taken under tow? [46]

A. Yes, I had a gasoline pump borrowed from a guy from Molokai.

(Testimony of John Y. K. Cho.)

Q. A different one from the Board of Water Supply pump?

A. Yes, sir. It was a better pump than the Board of Water Supply pump.

Q. More or less capacity?

A. It could take more capacity than the Board of Water Supply pump—was an old pump. As for this pump, it was pretty near brand new pump.

Q. Did the Kolo have a pump on it?

A. Yes, they did.

Q. Did you use the Kolo pump at all to pump out the Tenyo Maru while you were at Kaunakakai?

A. Yes, we tried that pump that night, and the suction of it, the hose they had was not proper for the pump; it would just suck the sides of the hose together.

Q. So that it was unable to draw the water out?

A. Draw the water out.

Q. When you were in Kaunakakai that night, were your pumps able to keep up with the water that was coming through the leak, or not?

A. It was keeping up. That is the reason why we had it up high and dry more or less that next morning. In a few instances we had to even cut off the motor because it was not sucking any water because it was so dry inside. They would only just run the engine, and we had to kill it and prime it again [47] with water to start the engine again.

Q. Did Joe check the rigging and everything before you left the harbor?

(Testimony of John Y. K. Cho.)

A. Yes, he checked everything.

Mr. Quinn: Your witness.

Cross-Examination

By Mr. Collins:

Q. Mr. Cho, you said that you made about \$3800 in four months' fishing; is that right? Was that your gross take?

A. That is my net take.

Q. After paying the crew and all expenses?

A. Yes, sir.

Q. The other figure that you gave of about \$600 a month; is that net also?

A. Yes. That is on the off months like.

Q. I assume that is before taxes. A. No.

Q. After taxes?

A. What do you mean by "taxes"?

Q. I mean, when you say you made \$600 a month, you made that clear; you have paid your expenses, you have paid your taxes, you have paid everything, you have paid your crew and everything else?

A. Yes, after taking out supplies and everything.

Q. Did you ever go out on the ship at all, on these [48] fishing trips? A. Yes, sir.

Q. But you did not go out on this particular trip where she went aground? A. That's right.

Q. You did not? A. I did not go.

Q. Now, you say you first heard that she went on the reef on Sunday or on Monday?

A. On Sunday.



(Testimony of John Y. K. Cho.)

Q. Would you tell us again what you did on that Sunday?

A. On that Sunday I don't know what I did. You mean where I went that Sunday?

Q. Yes, what you did in connection with your sampan that was on the reef.

A. Well, my sister called me up. She said that the Coast Guard called her and told her that the sampan was aground at Molokai, so I went down—and the Coast Guard said they couldn't pull it off because there was no life and danger, and it didn't have navigation and we would have to hire a salvage company. So I went down to Young Brothers. I believe before that my sister called Mr. Harrison, or I did, I don't remember. Then I went down to the Young Brothers and talked to Captain Pavao and Mr. Harrison over the 'phone, and they said Joe Kahiapo was going to Molokai the next morning. [49]

Q. Yes.

A. And they said that have Joe to do whatever he can for the boat. And I made arrangements to meet him there at 2 o'clock the next day.

Q. Now, this discussion that you had with Mr. Harrison and Mr. Pavao, where was this discussion held?

A. I believe Mr. Harrison was at home, because it was on Sunday that we called him up.

Q. Did you talk to Mr. Harrison?

A. Yes, I did.



(Testimony of John Y. K. Cho.)

Q. At his home?

A. At his home, by 'phone, I believe.

Q. You telephoned him? A. That's right.

Q. What time of day was that?

A. I believe it was about in the late afternoon. I don't quite remember.

Q. You say that was around five o'clock?

A. Before five.

Q. Between four and five?

A. Well, just about there, between three and four, I believe.

Q. And what did you say to Mr. Harrison?

A. I don't quite remember. I know something like I told him that my boat was on the reef down in Molokai. Most [50] of the discussion I had with Captain Pavao saying that Joe was going down.

Q. Did you speak to Mr. Harrison about Young Brothers tug's helping you? A. Yes, sir.

Q. What did you say?

A. I don't quite remember what I said.

Q. Well, in substance, what did you say?

A. In other words, to help me get my boat off the reef.

Q. Did you ask him to have a Young Brothers tug assist you? A. That's right.

Q. What did he say?

A. He said that he would because the Kolo was going there the next morning.

Q. Was there any discussion of price?

A. The discussion of price came when the boat was in Molokai.

(Testimony of John Y. K. Cho.)

Q. On this particular afternoon, in this telephone conversation that you speak of, was there any discussion of price?

A. No, no discussion of price but——

Q. Was there any discussion of gear? Did he ask you any questions as to what gear the sampan had aboard?

A. What gear?

Q. Yes, towing gear. [51]

A. Well, that afternoon, even I——

Q. In this telephone conversation with Mr. Harrison was there any discussion about the towing gear that the sampan had?

A. The sampan didn't have any towing gear.

Q. Was there any discussion with Mr. Harrison about it?

A. No, there was not.

Q. Was there any discussion on the condition of the sampan?

A. Oh, we knew that it was on the reef at that time, but we didn't know the extent of the damage.

Q. Was there any discussion with Mr. Harrison about what condition the sampan was in on the reef?

A. I don't remember.

Q. Was there any discussion about a tow to Honolulu?

A. I don't know.

Q. When you asked for assistance, did you ask for assistance from the reef to the pier, or did you ask for assistance to have the sampan brought to Honolulu?

A. Assistance to salvage the boat.

Q. Was there any discussion about Honolulu?

(Testimony of John Y. K. Cho.)

A. There was most likely, but they had to bring it to Honolulu.

Q. Did you ask him about towage to Honolulu?

A. That point didn't come out. We just said to salvage [52] the boat for us.

Q. Did you ask him that the sampan be taken off the reef and brought into Kaunakakai?

A. The discussion was, we just wanted the sampan to be salvaged.

Q. But you didn't say anything about where it was to be taken after it was taken off the reef?

A. It most likely would have to go into Kaunakakai first anyway.

Q. I am talking about this conversation you say you had on the telephone with Mr. Harrison. Was there any discussion as to whether the sampan, after it was taken off the reef, would be taken to Kaunakakai, to Kolo, or Honolulu, or anyplace else?

A. I guess it would be taken to Kaunakakai.

Q. Was there any discussion in that conversation about its being thereafter towed to Honolulu?

A. There was no discussion. The discussion was not that long.

Q. You never mentioned to Mr. Harrison in this conversation that you wished the sampan to be towed to Honolulu?      A. That's right.

Mr. Quinn: I object, if the Court please. I didn't realize this was going on this long. I object to the question now before the Court and the entire series of questions as being [53] immaterial.

(Testimony of John Y. K. Cho.)

Mr. Collins: On the contrary, your Honor, we consider this the very essence of the case. The question is as to the responsibility of Young Brothers, and it seems to me that any conversation that was had with Young Brothers' representative in connection with any of this work that was done is very material.

Mr. Quinn: If I may be heard, if the Court please. That is the error into which I think Respondent has fallen. He says the question is the responsibility of Young Brothers. It is no such thing. Young Brothers may possibly be a Claimant, but the question is the responsibility of the Tug Kolo, and so long as a person who is in possession of the Tug Kolo, and that is the only requirement, commits a maritime tort, the Tug Kolo is responsible. We are not interested in Young Brothers. We are interested in the Tug Kolo, and not Mr. Harrison or Young Brothers.

The Court: On the other hand, might it not well be that the contract, if any, which Young Brothers made for the Kolo might have a good deal of bearing on the situation.

I take it that he is leading up to a situation where he might agree with you and say, Nevertheless, Young Brothers made a contract for the Kolo, which would have some significance or relevancy here.

Mr. Quinn: I am not sure I get the drift, if the Court [54] please. If you mean a contract whereby—

(Testimony of John Y. K. Cho.)

The Court: —the ship was bound, the Kolo.

Mr. Quinn: Well, even assuming the ship was bound to take it only to Kaunakakai, the ship did, in fact, take it to Honolulu; unless he means a contract on the part of the Tenyo Maru not to assert its rights under the maritime law as some sort of a limitation of liability for tort, then that has not even had a glimmer in this entire examination or in the pleadings. If there is a contract of some sort limiting liability I take it should have been in the Answer. But if it is a question entirely of whether Young Brothers authorized or did not authorize, which I take it is the point that is sought to be brought out one way or the other here, I suggest that as a matter of law it is completely immaterial to this action.

The Court: I understand your point, but at the moment I don't know enough about it and the admiralty law, very frankly, to rule squarely on it, so I am going to overrule your objection, and since that is the basic question, we can get to the facts when we have all the facts on it. But you may have an exception.

Mr. Quinn: Thank you, your Honor.

The Court: And it will run to this line. But, actually, while we have a stopping point here, as I understand this witness, so far he has simply told us that in this telephone conversation with Mr. Harrison here in Honolulu on that [55] particular Sunday before he, the witness, went over to Molo-

(Testimony of John Y. K. Cho.)

kai, that the talk between himself and Harrison was simply with respect to salvaging the Tenyo Maru from its plight, purportedly, the Maru being on a reef in Molokai. But there was no discussion with Mr. Harrison I have yet heard as to where the ship Maru was to be taken once it was pulled off the reef; is that right?

The Witness: Yes.

Mr. Collins: May I have the last question.

(Question and Answer read by the Reporter as follows:)

“Q. You never mentioned to Mr. Harrison in this conversation that you wished the sampan to be towed to Honolulu?

“A. That’s right.”

Q. (By Mr. Collins): Now, this discussion you had with Mr. Pavao, where did that take place?

A. It took place in the Young Brothers’ office.

Q. And about what time in the afternoon was that?

A. That is the same time when——

Q. Was it before or after the telephone call?

A. Mr. Pavao was there when I called Mr. Harrison.

Q. Well, now, will you tell us what the discussion was with Mr. Pavao.

Mr. Quinn: I object. Same objection.

The Court: Same ruling.

Mr. Quinn: I object to this, I think, on another ground; [56] subject to an identification of Mr. Pavao, it is hearsay.



(Testimony of John Y. K. Cho.)

The Court: I would like to know who he is.

Q. (By Mr. Collins): Do you know who Mr. Pavao is? A. Yes, sir.

Q. Would you tell the Court who he is?

A. He is the port captain for the Young Brothers.

Mr. Quinn: What?

The Witness: He was the port captain for the Young Brothers.

The Court: That is admitted? You agree?

Mr. Collins: Yes. I have been advised that he was at that time.

The Court: All right.

Q. (By Mr. Collins): Now, what was the substance of the discussion you had with Mr. Pavao?

A. To help me salvage the boat.

Q. Was there any mention made of Honolulu at that time?

A. Well, it was more or less taken for granted to bring my boat back.

Q. Did you ask him that Young Brothers should bring your boat to Honolulu?

A. The main subject was that I wanted my boat to be salvaged.

Q. But you did not mention Honolulu? [57]

A. It didn't come up.

Q. Was there any discussion with respect to the price of the salvage operation?

A. The salvage operation, the price was discussed before the boat was pulled off the reef.



(Testimony of John Y. K. Cho.)

Q. No; in this particular conversation on this Sunday afternoon?

A. He couldn't tell what the price would be. He couldn't tell because he didn't know what the extent of damage was there, so he told Joe to do whatever he can.

The Court: "So he told Joe to do whatever he can"; the last I knew you were talking to Mr. Pavao. It strikes me you are now calling somebody else.

The Witness: Joe, because Joe was in the office at the same time Mr. Pavao was in the office.

The Court: At this conversation with Mr. Pavao that you just described a new person was present, namely, Joe?

The Witness: Joe Kahiapo.

Q. (By Mr. Collins): Who is Joe?

A. Joe Kahiapo is the captain of the Kolo.

Q. Was there any discussion as to the condition of the sampan?

A. There wasn't because we didn't know the extent of damage on that boat. All we knew was it was on the reef in Molokai. [58]

Q. Mr. Pavao did not ask you anything about its condition?

A. No. We just told him that the boat was on the reef and we wanted our boat to be salvaged.

Q. I take it your answer is, he did not ask about the condition of the sampan.

A. I don't believe he did.

(Testimony of John Y. K. Cho.)

The Court: Just for clarity, a moment ago you said "we." Was there someone with you, or does that "we" mean Pavao, Joe and yourself?

The Witness: We?

The Court: You said "We asked for salvage." Did someone go with you?

The Witness: Yes, my sister.

The Court: Your sister was there at this conversation which you had with Mr. Pavao and Joe?

The Witness: Yes, sir.

Q. (By Mr. Collins): What did Mr. Pavao say about the Young Brothers tug being used in this operation?

A. Well, that day the only arrangements made was that I wanted my boat to be salvaged. We didn't know the extent of damage or how far in that sampan was, and Joe was going to Kaunakakai that afternoon, and we made arrangements to meet there, and he told him to do whatever he could.

Q. You made those arrangements with Joe at this conference [59] at which your sister was present and Mr. Pavao was present?

A. That's right.

Q. Did you have any other conference with Joe prior to your leaving here?           A. No, sir.

Q. That is the only one?

A. That's right, to meet at Kaunakakai Harbor at 2 o'clock.

Q. And you say that Mr. Pavao, as a result of

(Testimony of John Y. K. Cho.)

this discussion, arranged to have Joe go down to help you?      A. That's right.

Q. How did you happen to call Mr. Harrison?

A. Because Mr. Harrison is head of the Young Brothers, or vice president of the Young Brothers.

Q. Well, if everything was being worked out with Mr. Pavao, the port captain, why did you bother calling Mr. Harrison?

A. Well, my sister called him when we were at home, I believe, and they told her to call Mr. Harrison to make arrangements, but when we went down to the Young Brothers' office, I guess Mr. Pavao went over to ask Mr. Harrison, too.

Q. It was Mr. Pavao that made the telephone call, and not you?

A. I made the telephone call, but Mr. Pavao must have talked to Mr. Harrison.

Q. Did Mr. Pavao ask you to make the telephone call? [60]

A. No, I did.

Q. Well, again, if everything is being worked out here, all the arrangements are being made for this salvage operation, why did you bother calling Mr. Harrison?

A. Because Mr. Harrison is the head of the place, and I guess they didn't know the price of salvage.

Q. But you say there wasn't any discussion on price.

A. There wasn't any discussion, but yet they

(Testimony of John Y. K. Cho.)

had to tell Mr. Harrison, I believe—I don't know; that seems vague, that——

Q. In other words, you called Mr. Harrison——

Mr. Quinn: I object and ask that the witness be allowed to answer and explain, if the Court please.

The Witness: I can not——

The Court: He had not quite finished. Go ahead.

The Witness: Because I can not tell you exactly word for word what I discussed with Mr. Harrison at that time, because I just wanted my boat to be salvaged. I don't know what I talked to Mr. Harrison or Mr. Pavao word for word because that was a year ago.

Q. (By Mr. Collins): But you say that you think it might have been for the reason of price, although price wasn't discussed in this meeting?

A. I don't remember.

Q. But you do remember that you made the telephone call? A. Yes, I think I did. [61]

Q. During this conference? A. Yes.

Q. And that Mr. Harrison said that he would arrange to have the Young Brothers tug salvage your sampan?

A. Something like that. I think that afternoon—I think Mr. Harrison knew that Joe was going down to Kaunakakai that afternoon, so——

Q. Was Joe supposed to leave on Sunday afternoon?

A. I don't know when, but I believe it was the next morning when he left. Anyway, the arrange-

(Testimony of John Y. K. Cho.)

ment was to meet at Kaunakakai at 2 o'clock.

Q. Are you sure that this telephone conversation with Mr. Harrison didn't take place on Monday?

A. It couldn't have taken place on Monday.

Q. It could have? A. It couldn't.

Q. Could or could not?

A. It could not have.

Q. And you say this conference was held in Mr. Pavao's office?

A. I don't know whose office that was.

Q. Was it in an office at Young Brothers?

A. That's right.

Q. And your only discussion with Joe was at that conference prior to your going to Molokai and meeting him there? [62] A. That's right.

Q. Now, when did you arrive at Molokai?

A. I arrived Monday morning.

Q. You didn't leave that afternoon?

A. No.

Q. What did you do after you arrived there?

A. I went down to the boat to see what extent of damage there was and to see whatever I could to help bring that boat out.

Q. You went out to the boat on the reef?

A. That's right.

Q. Were there any pumps going at the time?

A. It wasn't necessary to run any pumps at that time. It was steadfast on the reef.

Q. Your answer is, There were no pumps going; is that right?

(Testimony of John Y. K. Cho.)

A. That's right. It wasn't necessary to have any pumps going at that time.

Q. Now, did you make arrangements to secure a pump from the Board of Water Supply?

A. Yes.

Q. Didn't you put that pump out on the boat?

A. I did, but——

Q. And didn't you operate—Go ahead.

A. Your question was what I did to the boat when I first [63] got there, so I said I went down there to see what I could do.

Q. Yes.

A. And the reason why I borrowed the water pump was, since the Young Brothers was going to try to pull it out, to lessen the weight on that boat.

Q. Well, will you tell us what you meant when you said it was not necessary to have pumps going?

A. It wasn't necessary to have pumps going at that time because the boat was steadfast, and on that place it would be nothing to keep running that pump all the time, because the water would come up to a certain level, and that is about all.

Q. And you say that Joe arrived there that afternoon?

A. Yes, sir.

Q. That was Monday afternoon?

A. Yes, sir.

Q. Did you have any discussion with him?

A. He said that the tide was low, so he couldn't do anything then, so he was going back to Kolo, and I believe he say he will be back that afternoon and try to see what he could do to it.



(Testimony of John Y. K. Cho.)

Q. How long have you known Joe?

A. Since the time at the Young Brothers.

Q. You didn't know him before that?

A. No, sir.

Q. Did you stay aboard the ship that night? [64]

A. You mean on the Tenyo Maru?

Q. Yes.

A. I had my crew on board the ship that night.

Q. Did you stay on board? A. No, sir.

Q. When did you start the first pump going then?

A. I believe—I don't remember quite whether it was during that afternoon of the conversation with Joe——

Q. Well, let me ask you this: Joe was going to try to pull you off that afternoon, wasn't he?

A. If the tide was right.

Q. Did you arrange to have the pump put aboard before he started working on the tow?

A. That's right.

Q. You did. Did you keep the pump going all night? A. Well, on the reef?

Q. Yes.

A. No, sir, because if I had kept the pump going all night, the pump would lessen the weight of the boat and the boat liable to go further in, because where it was, it should be right there. If I lessen the boat, the waves would shove it further in and it would be worse.

Q. Were you working the pump when Joe was trying to pull it off?



(Testimony of John Y. K. Cho.)

A. Yes, the pump was working, and before Joe pulled us [65] off, during the time we made arrangements for the bridle to go on to pull us off, I had to lessen it and it would take time to get the water out of that boat.

The Court: Excuse me. Am I correct in understanding that the Tenyo Maru was pulled off the reef on Monday and went to the pier at Kaunakakai?

Mr. Collins: No, that is not quite correct, your Honor. An attempt was made on Monday afternoon by a small tug, unsuccessfully, and the operations were conducted on the next day. I believe that is correct.

The Court: Thank you.

The Witness: Excuse me. Mr. Quinn, what day was that? I don't remember the date the tug boat was pulled off the reef—I mean, which is the date? Was it on the 7th or the 6th?

Mr. Quinn: That is stipulated, your Honor. I think I can tell the witness that.

Mr. Collins: Yes.

Mr. Quinn: It was the 7th.

Mr. Collins: That is Wednesday, your Honor.

The Court: Monday and Tuesday were utilized in trying to get——

Mr. Collins: No, I am incorrect.

Mr. Quinn: Pulled off on the 6th and entered on the journey on the 7th. [66]

(Testimony of John Y. K. Cho.)

The Witness: There was just one attempt to pull it off.

Mr. Collins: Started Monday afternoon unsuccessfully, carried on Tuesday successfully, and brought into the pier; and the next day it started for Honolulu.

Mr. Quinn: Admitted allegations, paragraphs 3 and 4 of the Petition, state that on Saturday—Libellant was unable to engage a tug to salvage the Tenyo Maru until Tuesday, April 6, when the Kolo and the Mahoe towed the Tenyo Maru off the reef, and during the night of April 6, the Tenyo Maru remained at Kaunakakai, and about noon, April 7, she started on her journey to Honolulu.

The Court: Thank you.

Q. (By Mr. Collins): Well, am I correct in assuming that after the towing operations were unsuccessful on Monday afternoon you stopped pumping?

A. On Monday afternoon we didn't pump no water, and we didn't make no attempt because the only thing Joe said the tide was not high enough, on Monday, so on Tuesday the real attempt was made on that boat.

Q. Well, on Monday was a line actually put over to the sampan? Did they attempt to tow you off on Monday?

A. No, sir.

Q. No attempt was made at all?

A. No, sir.

Q. And you say Joe said he was going to Kolo?

A. Yes.

(Testimony of John Y. K. Cho.)

Q. When did he leave Kaunakakai?

A. As soon as he got there, he left there for Kolo.

Q. You mean after he looked over the situation?

A. Well, he looked at the boat where it was situated, and after that he said he would be back, and he left because the tide was low.

Q. When did Joe return to Kaunakakai?

A. I don't know if it was that afternoon or the next morning.

Q. Did any other Young Brothers tug come in there?      A. Yes, the Mahoe the next morning.

Q. Do you recall when the Mahoe came in?

A. Beg pardon?

Q. Do you recall when the Mahoe came into the Kaunakakai Harbor?

A. I think it was Sunday—No, Tuesday morning.

Q. Was that before or after Joe came in?

A. Came—I mean Joe came to Kaunakakai before the Mahoe.

The Court: But he left again to go to Kolo?

The Witness: Yes, but I don't remember when that boat—which one came in first, though. I believe that both of them came in together maybe.

Q. (By Mr. Collins): Well, sometime on Tuesday morning the Mahoe came in and Joe came in on the Kolo before that; is [68] that correct?

The Court: No, you are confused. He thought

(Testimony of John Y. K. Cho.)

you meant when they first arrived. In other words, he is trying to make it clear to you that the Kolo first arrived at Kaunakakai.

Mr. Collins: That is on Monday.

The Court: He isn't taking into consideration in this question of yours that trip to Kolo. When I asked him, he said he thought they both possibly came back and re-entered——

Mr. Collins: Suppose we try to clarify that.

Q. (By Mr. Collins): Joe left, you say, on Monday afternoon after he looked the scene over and said that the tide was too high? A. Too low.

Q. I am sorry. The tide was too low. Then Joe came back to Kaunakakai, did he?

A. Yes, sir.

Q. When did he come back?

A. If I am not mistaken, I think the Kolo and the Mahoe came in together from Kolo the next morning.

Q. Do you recall about what time that was?

A. I don't.

Q. Well, was it early morning?

A. Oh, it was in the morning.

Q. Early morning. Well, now did you have any discussion [69] with Joe in connection with this salvage operation on Tuesday?

A. He didn't know the rates on them, so I called Young Brothers that morning.

Q. You called Young Brothers on Tuesday morning?

(Testimony of John Y. K. Cho.)

A. Tuesday morning, talked to Pavao, and he gave me the rates on the tug boats; the big one would be fifty and the small tug would be \$35.

Q. Did you put in this call before or after the tugs came in?

A. During the time the tug was in.

Q. It was after the tugs came in to Kaunakakai; is that right?      A. That's right.

Q. Could you give us any idea as to what time in the morning you put that call in?      A. No.

Q. You cannot?

A. I cannot recall. I know it was in the morning, though.

Q. In this telephone conversation with Mr. Pavao, was there any mention made of towage to Honolulu?

A. That's right. He gave me the prices on them.

Q. Did you ask him the rates for towage to Honolulu?      A. For salvaging.

Q. Was there any discussion about Honolulu?

A. Well, I wanted my boat salvaged, and he said the rates on the tugs were \$35 and \$50.

Q. Was there any mention made of Honolulu?

A. I don't remember.

Q. Did you have any discussion with the captain of the Mahoe?

A. Well, we talked, but I don't know what we talked about.

Q. Did you talk about the salvage operation?

A. Salvage operation, but talked to Joe on that.

(Testimony of John Y. K. Cho.)

Q. But you do recall having a conversation with the captain of the Mahoe? A. Yes.

Q. When did the salvage operation start?

A. In what way? When the Young Brothers started pulling or when——

Q. Yes, when did they start putting their lines on and pulling it?

A. Their lines were rigged over our boat, and that was about 4 o'clock, I believe.

Q. About four?

A. Four thirty, like that.

The Court: A.M. or P.M.?

The Witness: P.M.

The Court: Four thirty p.m. Tuesday afternoon? [71]

The Witness: That's right.

The Court: You mean you had been talking from morning until 4:30 p.m.?

The Witness: It was because of the tide. The tide was high about then.

Q. (By Mr. Collins): Do you have any bits on the sampan?

The Court: What?

Mr. Collins: Bits.

The Witness: Bits?

Q. (By Mr. Collins): Yes.

Mr. Quinn: Brace and bit?

Mr. Collins: Strike that.

Q. (By Mr. Collins): How did they rig up the lines to pull the sampan off?



(Testimony of John Y. K. Cho.)

A. Threw a bridle over, more or less, I mean a rope in the center, you know, a big rope like that right around the boat.

Q. All the way around?

A. That's right. Then we put small ropes to hold that rope in place over the boat.

Q. That would seem to be rather a complicated operation. Did that take very long?

A. Well, we did that during that time. They told us to rig it up.

Q. Did you rig it up? [72]

A. Yes, to save money.

Q. Was the captain of the Mahoe on board the sampan at the time——

Mr. Quinn: I object, your Honor. Even though your Honor has ruled on my prior objection with respect to relevance or materiality, I strongly object that any actions of the captain of the Mahoe have nothing to do whatsoever with this unless it is further shown, in connection with this other immaterial ground, that the captain of the Mahoe is the senior agent away from Young Brothers, or something akin to that.

The Court: That is an angle I didn't catch in this question. Will you read the question?

(Question read.)

The Court: What is your position with respect to this objection?

Mr. Collins: Well, our position is, first of all, your Honor, if I might make a statement, the

(Testimony of John Y. K. Cho.)

captain of the Mahoe is the senior tug boat captain, or was at that time, in the port, something that we will subsequently bring out; but the principal thing that we are endeavoring to do is to show that there was absolutely no authority, no relationship between this towage between Kaunakakai and Honolulu, absolutely no relationship between that towage job and Young Brothers as such. Counsel for the Libellant seems to feel that is entirely immaterial, which is something with which we disagree violently, [74] and we wish to get the picture clear on that point.

The Court: I think I understand the difference between the two of you on that score, but in the painting of this picture, as I understand it, we still have the Tenyo Maru on the reef.

Mr. Collins: We do.

The Court: And this man, the owner, has said that he and his ship's crew prepared the sampan in terms of rigging in order to save money, so that the tug boat could come along and pull it off the reef. Let's get the thing off the reef to the pier before we start this trip to Honolulu. And your question, as I understand it, relates to that situation and asks this witness whether or not, when the sampan was still on the reef, before, while, or after he and his men had prepared the sampan for towage, the captain of the Mahoe came aboard the sampan.

Mr. Collins: Yes. We will withdraw the question, your Honor.

(Testimony of John Y. K. Cho.)

The Court: All right. And let me, while we have an interruption, make sure I am right. You did this preparing of your ship, or your boat, this rigging business that you talked about, while it was on the reef?

The Witness: That is right.

Q. (By Mr. Collins): Was that the same rigging that was used in the tow to Honolulu? [75]

A. No, sir.

Q. Now, you told us with both tugs towing the sampan was pulled off? A. That's right.

Q. And she was brought into the harbor at Kaunakakai? A. Yes, sir.

Q. Were your pumps going at the time?

A. Yes, sir.

Q. You had the Board of Water Supply pump on board at that time? A. Yes, sir.

Q. And you had the gas pump on board?

A. The Board of Water Supply is the gas pump.

Q. Weren't there two pumps?

A. The Board of Water Supply pump was returned and then a new pump was brought in the picture.

Q. Well, in the trip in to Kaunakakai you had the gas pump on board? A. That's right.

Q. With the men operating the hand pump also?

A. Yes, sir.

Q. About what time was she tied up?

A. She was tied up about a quarter to five, I believe. It didn't take long.

(Testimony of John Y. K. Cho.)

Q. Did you have any discussion with the captain of the [76] Mahoe after the sampan was tied up?

A. Yes, he told me to call Honolulu if I wanted the boat to be towed home. Then I told Joe that, after he put the lines on, and he said from here he was taking authority.

Mr. Quinn: May I have that read?

(Answer read.)

Q. (By Mr. Collins): Did you thereafter call Honolulu before the trip to Honolulu started?

A. No, I did not, because Joe took the authority. He was the captain of the ship. It is understood that the captain does what he wants.

Q. Did you stay on board the sampan that night?

A. No, I did not. I went down there and worked on the boat and I came back—I went back again to check all the time.

Q. You say that the hole in the bottom was in a rather inaccessible place; it was hard to get at?

A. That's right.

Q. Did you make any attempt to get at it?

A. Yes, sir. Even had the CPC crane try to get at it. They lift the boat up.

Q. You found that you couldn't patch it up from inside?      A. No, sir.

Q. About how much water was in the sampan when she first came into the pier there?

A. Pumps working. There was not too much

(Testimony of John Y. K. Cho.)

water in it; [77] about a foot, a foot and a half, or a little more.

Q. And the gas pump was being operated, and the hand pump was being operated; is that right?

A. Just the gas pump.

Q. Now, you say you did not stay on board that night. How late were you there with it?

A. What was that again?

Q. You didn't stay with the boat all night long?

A. I didn't stay continuous. I came over to check, help with the pumps. And that night tried Young Brothers tug boat pump on it, too.

Q. Were you there off and on all night?

A. That's right.

Q. When you looked at it in the morning, how much water was there in it?

A. It was dry.

Q. It was dry?

A. That's right.

The Court: Excuse me; let's get this straightened out. At what point of time did you "swap" gasoline pumps by returning this City pump and getting the new pump?

The Witness: It was about nine o'clock, I believe.

The Court: Tuesday night?

The Witness: Wednesday.

Q. (By Mr. Collins): Didn't I understand correctly that [78] you "swapped" the Board of Water Supply pump before the sampan was actually towed off the reef?

A. No; the Board of Water Supply pump was on the boat all night.

(Testimony of John Y. K. Cho.)

Q. And you got the gasoline pump that night?

A. The two of them was gasoline pumps.

Q. The second pump——

A. The second pump was the next morning.

The Court: Let's review that again, since we are all confused.

I understand there was a hand pump aboard the sampan at all times.

The Witness: We have got three hand pumps.

The Court: Well, we had only heard of one before. After you went to Molokai, and while your vessel was still on the reef, I understand you borrowed from the City and County or from the Board of Water Supply a gasoline pump.

The Witness: That is right.

The Court: And aboard a skiff took it out to your sampan on the reef.

The Witness: That's right.

The Court: And that gasoline pump stayed on your sampan during the time it was pulled off the reef and to the pier.

Now, when was that City and County property, this gas pump, [79] taken off your boat?

The Witness: The City and County gas pump was taken off the boat as soon as I got the other pump.

The Court: Between the getting of the second gasoline——

The Witness: We got the second pump and then we returned the first one. There wasn't no break in between.



(Testimony of John Y. K. Cho.)

The Court: All right, and you got the second gasoline pump on Wednesday morning?

The Witness: That's right.

The Court: At which time you returned the County property?

The Witness: That's right.

The Court: Or Board of Water Supply property?

The Witness: That's right.

The Court: At the time you tell us that the Young Brothers gasoline pump aboard the Kolo was tried on your sampan——

The Witness: That was tried in the morning.

The Court: On Wednesday?

The Witness: Wednesday.

The Court: Then at that time there were two pumps working on that sampan?

The Witness: But the Kolo pump couldn't pump the water.

The Court: But there were two; one was working and one couldn't work? [80]

A. Yes.

Q. (By Mr. Collins): Well, when you said that the sampan was dry in the morning, about what time in the morning was that?

A. I stayed there all morning after that.

Q. It was dry all morning?

A. Well, I can't say dry, but there was water in it and at times we had to kill the motor to rest the motor——

(Testimony of John Y. K. Cho.)

Q. Well, at the time you put the second pump—so we can distinguish that from the Board of Water Supply pump—at the time you put the second pump on board, was she dry then?

A. The second pump; yes, she was dry.

Q. And then, if I understand correctly, you just ran that second pump during the balance of the morning off and on?

A. Off and on, because the pump was better than the Board of Water Supply pump. It was a bigger capacity pump.

Q. The hand pumps weren't operated at all that morning?

A. It wasn't necessary. You see, the reason why we have all those hand pumps on that boat is because water is always in that boat when we have ice in it, and the ice melts in that boat, so we get that pump and pump the water out. That is the reason for the hand pump.

Q. You say that you attempted to calk it from the outside?

The Court: At the pier? [S1]

Q. (By Mr. Collins): At the pier. Did I understand you correctly?

A. I tried to calk it, and I put some calk in it on the reef.

Q. On the reef; but you did not at the pier?

A. At the pier I tried, because I couldn't get at it. The water was dirty and I had to dive. It was below the water line.

(Testimony of John Y. K. Cho.)

Q. Were you at the dock at the time that the tow started, they started pulling out of Kaunakakai for Honolulu? A. Yes, sir.

Q. You were on the sampan immediately before it started being towed out. Did you give it a final look-over before the tow started?

A. Well, what do you mean by "final look-over"?

Q. Well, I assume that during the morning you were on board to see how the pump was working, to see if something couldn't be done to patch it up; and I assume that you were on and off the sampan during the morning, weren't you?

A. Yes, sir.

Q. And just before she started being pulled out for Honolulu, you looked it over again, didn't you?

A. It is understood I looked at it.

Q. How much water was in there the last time you saw it?

A. When she started out, the water was not much in there. [82] She was riding high.

Q. About how much water would you say was in it?

A. Say it is less than a foot, though.

Q. Was the pump working at that time?

A. Yes, the pump was working. Sometimes they had to cut it off.

Q. At the time the tow started for Honolulu, you had three men on board; is that correct?

A. Yes, sir.

(Testimony of John Y. K. Cho.)

Q. That was the regular crew?

A. Yes, sir.

Q. Did you have any discussion with Joe about signal arrangements between the tug and the sampan during the trip?

A. What sort of signal arrangement?

Q. Well, any system of signaling whereby the tug could know what the condition was on the sampan?

A. No, sir.

Q. No discussion of that at all?

A. No, sir.

Q. Did you give any instructions to your crew about that, about how they should notify the tug if anything should happen to go wrong?

A. No, sir.

Q. You did not?

Mr. Collins: That is all, your Honor. [83]

The Court: Redirect?

Mr. Quinn: When you cut off the pumps at the pier, did the water come in?

The Witness: Yes, it came in.

Mr. Quinn: I have no further questions.

The Court: You are excused.

(Witness excused.)

The Court: Do you have another witness?

Mr. Quinn: Yes, your Honor.

The Court: What is your pleasure? Do you want to operate until one o'clock and then have the afternoon free, or do you wish to have an afternoon session? It doesn't make a bit of difference to me.

Mr. Collins: If your Honor please, I think we would prefer to have as much time in as possible to wind up the case as quickly as possible.

Mr. Quinn: That is our feeling also.

The Court: We will take our recess at noon and return at 1:15.

Mr. Collins: Recess at noon?

The Court: Recess at noon, and then what time do you want to start?

Mr. Collins: One o'clock.

Mr. Quinn: One-thirty, your Honor.

The Court: One-thirty? [84]

Mr. Collins: That will be fine.

The Court: All right.

## JOSEPH W. KAHIAPO

being called as a witness on behalf of the Libellant, and being first duly sworn, was examined and testified as follows:

The Court: Will you please state your name?

The Witness: Joseph W. Kahiapo.

The Court: That is?

The Witness (Spelling): K-a-h-i-a-p-o.

The Court: How old are you?

The Witness: Twenty-eight years old.

The Court: Do you live in Honolulu?

The Witness: Yes, sir, 45 Neiera Lane.

The Court: And are you employed?

The Witness: Yes, sir.

The Court: By?

The Witness: By Commercial Development.

(Testimony of Joseph W. Kahiapo.)

The Court: And the nature of your occupation is what?

The Witness: Welder burner.

The Court: Welder burner?

The Witness: Yes, sir.

The Court: And you are a citizen of the United States?

The Witness: Yes, your Honor.

The Court: Take the witness. [85]

### Direct Examination

By Mr. Quinn:

Q. Mr. Kahiapo——

The Court: I forgot to ask him “only”; citizen of the United States only?

The Witness: Yes, your Honor.

Q. (By Mr. Quinn): Mr. Kahiapo, where were you employed last year, April?

A. Before April 16 I was working for Young Brothers, Ltd.

Q. How long had you been with Young Brothers?  
A. Since February of 1944.

Q. And what was your job at Young Brothers last year?  
A. Tug operator and launchman.

Q. Tug operator and what?

A. Launchman.

Q. Launchman? A. Yes.

Q. And with what tug did you operate?

A. Well, I was working with the boat house at that time, and we usually alternate to run any of the



(Testimony of Joseph W. Kahiapo.)

tugs connected with the boat house and handling harbor duties and off shore.

The Court: You talk fast and very soft, and they can't hear you down there, so will you go over that again and speak slower and more distinctly.

The Witness: Well, I was with the boat house at that [86] time, and we run all the tugs connected with the boat house, all the tugs, they handled harbor job and off shore pilot job.

Q. (By Mr. Quinn): Are you qualified to act as master of a tug?

A. Under sixty-five feet?

Q. Under sixty-five feet? A. Yes.

Q. Were you acting as a master of a tug?

A. Tug Kolo at that time.

Q. The Tug Kolo. Do you know John Cho?

A. At the incident, yes.

Q. When did you first meet him?

A. That was, I think, April 5 of last year.

Q. And under what circumstances did you meet Mr. Cho?

A. Well, it was through an introduction from the port captain, assistant port captain—no, the port captain at that time, I think.

Q. What is his name? A. Hop O'Neill.

Q. What? A. Mr. O'Neill.

Q. O'Neill? A. Yes.

Q. And you say that was on April 5? [87]

A. That was the Sunday before the thing happened. I think it was April 5.

(Testimony of Joseph W. Kahiapo.)

Mr. Quinn: As a matter of fact, I think we stipulated it was April 4.

Mr. Collins: Sunday was the 4th. We will so stipulate.

The Court: All right.

Q. (By Mr. Quinn): When you met Mr. Cho, who else was there besides Mr. O'Neill?

A. Just the three of us.

Q. What was the purpose of that get-together—where did you meet Mr. Cho?

A. That was in the dispatch office, below the main office at Young Brothers, Pier 21, and we were consulting something about Johnny came there to see if he could get any assistance or something to have his tug salvaged from the reef at Molokai, and Hop O'Neill—well, the conversation was about, I believe that Hop O'Neill told Johnny I was going up there, and they came to see me if I can do anything about it.

I told them there was nothing for me to do but see the port captain or manager in the morning and he would give me the orders to go there to salvage the job. In other words, I couldn't right there accept the job without authority from the manager of the Company or the port captain.

Q. So then did you receive any—— [88]

Mr. Quinn: Strike that, please.

Q. (By Mr. Quinn): When was the next time you saw John Cho?

A. I met him, that was Wednesday following that, at Kaunakakai Harbor.

(Testimony of Joseph W. Kahiapo.)

Q. Wednesday following?

A. Yes, Wednesday following that Sunday.

Mr. Quinn: May I have your permission to read certain admitted stipulated facts to the witness?

Mr. Collins: No objection.

Mr. Quinn: These are the facts of date, and so forth, Mr. Kahiapo, so that you can orient yourself.

The Tenyo Maru went aground on Saturday, April 3. The Tenyo Maru was towed off the reef by the Kolo and the Mahoe on April 6.

The Witness: That is Tuesday.

Mr. Quinn: (Continuing) Which was Tuesday.

The Witness: Yes, that is right, Tuesday afternoon. It was after three o'clock, I think, because I finished my job at Kolo and I went to Kaunakakai.

Q. (By Mr. Quinn): Had you been to Kaunakakai before you went to Kolo? A. No, sir.

Q. When was the next time, then, that you saw John Cho after you had seen him in the Young Brothers office? [89]

A. Wait a minute. Let's see. I can't really recall what happened when I left Honolulu here. I think that was Tuesday afternoon. I didn't go to Kaunakakai before that.

Q. Were you the only tug that came to Kaunakakai on Tuesday afternoon?

A. Well, no; the Mahoe was there, too.

Q. Was the Mahoe with you?

A. Yes, sir.

(Testimony of Joseph W. Kahiapo.)

Q. It had been with you at Kolo?

A. Well, the Mahoe was at Kaunakakai and I was at Kolo. She comes to Kolo to pick up her barge, which I give to her, because that is a shallow water port. Both of us proceeded to Kaunakakai Tuesday afternoon.

Q. Why did you go to Kaunakakai on Tuesday afternoon?

A. I had orders from the port skipper to go out and salvage the Tenyo Maru which was on a reef.

Q. When you got there Tuesday afternoon, what did you do? Describe your operations, please.

A. Well, I spoke to the skipper of the Mahoe first to see if he had everything ready on the sampan to go ahead with the salvage job. There was rigging of the bridle and see that the tow lines were all set. And I talked to Johnny at that time. He was on a small little skiff, so we proceeded out there, got the boat off the reef with the help of the Mahoe, of course. I didn't pull it off the reef by myself. [90]

Q. Did you try to pull it off yourself?

A. I couldn't do it with the Kolo alone, so the Mahoe threw a line over my bow and we pulled the Tenyo Maru off the reef. I pulled the Tenyo Maru—after casting my line, I pulled the Tenyo Maru alongside with me and we proceeded to Kaunakakai, which was only about five hundred yards distance from where the Tenyo Maru was.

The Court: To help my shorthand here, what is

(Testimony of Joseph W. Kahiapo.)

the name of the skipper of the Tug Mahoe?

The Witness: Ching Ho.

The Court: Agreed?

Mr. Collins: We so stipulate.

Mr. Quinn: What is it?

Mr. Collins: Ching Ho.

Mr. Quinn: Ching Ho is the skipper of the Mahoe.

The Court: The Johnny you have been talking about is Mr. Johnny Cho?

The Witness: Yes.

Q. (By Mr. Quinn): After you got the Tenyo Maru into Kaunakakai, did you stay there that night?

A. Oh, yes. We planned to stay there, because we were figuring if there were no other dry dock facilities or repairs that could be done at Molokai I was to tow the sampan home, complete my end of the salvage job.

Q. Did you go aboard the Tenyo Maru? [91]

A. Yes, sir.

Q. And did you take note of the damage that had been done during the time she was on the reef?

A. We couldn't very well see the damage because she was so situated that it was impossible to see.

Q. Was the ship leaking?

A. She was leaking.

Q. Did she have pumps going while she was at the pier?

(Testimony of Joseph W. Kahiapo.)

A. All through the operation there were pumps going on board.

Q. When was it determined that you would tow the Tenyo Maru back to Honolulu? When did you decide that?

A. Well, that was Wednesday, the following day, about 11 o'clock.

Q. About 11 o'clock Wednesday morning. Did you talk with Johnny about the arrangements for that towage job?

A. We both agreed on the towage job, yes.

Q. Was there any doubt in your mind as to the fact that it had to be towed back to Honolulu?

A. Well, no. I was thinking of navigation safety reasons because that was a disabled craft, and I couldn't leave her sitting in the harbor. She couldn't stay there in the harbor; she would be a menace to the boats that came in; couldn't land around the wharf.

Q. You thought it was your duty as master of a tug to [92] get it out of Kaunakakai before it sank there?

A. No, we didn't think it was going to sink, because our pumps were working faster than the waters were coming in. The dry dock facilities up there, we figured it best to get home to keep my part of the salvage job.

Q. That was your salvage job, as you saw it, to take it off the reef and take it to Honolulu, if necessary?



(Testimony of Joseph W. Kahiapo.)

A. According to orders of the Company I was to do the best that could be done with the sampan at Kaunakakai and I used my own judgment on the case. That was my first salvage operation, and I wouldn't say I was too experienced on that job.

Q. I didn't hear that last.

A. I wouldn't say I was too experienced for that type of job because that was my first salvage operation.

Q. When did the Mahoe leave Kaunakakai?

A. She left that evening at 6 o'clock.

Q. Which evening?

A. Tuesday evening, with a barge to tow to Honolulu.

Q. And she didn't return any more after that?

A. No, sir.

Q. Will you describe what occurred leading up to the cutting loose of the tow. Will you tell what happened when you took the Tenyo Maru in tow until the time she was cut loose.

A. After we decided to tow the Tenyo Maru to Honolulu, [93] we rigged up a bridle around the cabin so she could be secured for the towing job. Then we proceeded, about 12 o'clock, or before 12 o'clock, that afternoon, and everything was going all right. But prior to towing the vessel home, we worked out some kind of signals between us because there were three seamen on board the Tenyo Maru, so as they could let us know if anything was coming up, so we could turn around or try to make some-

(Testimony of Joseph W. Kahiapo.)

thing be more safety for the vessel. Everything was going all right. We were hugging the Molokai coast all the way past Laau, and in the middle of the channel—I think it was in the middle of the Molokai Channel—I waved back to the boys and they waved back to me to signal everything was OK. She was riding high at that time and the pumps were going. So I took a walk right in front of the bow and turned around and the Tenyo Maru was under water. In other words, it happened so fast, I wouldn't know how it happened. For the safety of the boys that were on the Tenyo Maru, I pulled the tug full astern, pulled up all the line I could and chopped it off.

Q. You say when you looked back after going to the bow—first of all, you say you were on the stern and you looked and waved and they waved?

A. Yes, sir.

Q. And after a very short space of time you looked back and it was under water?

A. Yes, sir. [94]

Q. Would you describe what you mean when you say "under water"?

A. The whole cabin went right under the water.

Q. The whole cabin?

A. In fact, the whole Tenyo Maru was under water aft of the bow.

Q. And where were the crew standing on it?

A. They were clinging to the submerged part of the cabin.

(Testimony of Joseph W. Kahiapo.)

Q. And so you then proceeded to take up as much slack as you safely could and then cut your line and then what happened?

A. Well, I swung around to pick up the crew on the boat and in the meantime they were in the water; they dived off the sampan and were in the water. I came alongside where it was safe enough to pick them up. Then we proceeded to Honolulu.

Q. What was the situation of the Tenyo Maru the last you saw it?

A. She was submerged above the cab—I mean, she was submerged all the way down except for the tip of the bow was sticking out of the water.

Q. In other words, her decks were washed?

A. The decks and cabins and everything. She was sort of like this in the water, 45 degree angle (indicating).

The Court: I think it will be better to leave here there for the noon lunch period.

Mr. Quinn: Beg pardon? [95]

The Court: Let's leave her there for the noon lunch period.

Mr. Quinn: Very well, your Honor.

The Court: All right, we will take a recess until 1:30.

(Thereupon, at 12 o'clock noon, a recess was taken until 1:30 p.m. of the same day.)

\* \* \*

#### Afternoon Session

The Court: Are the parties ready to proceed?

Mr. Quinn: Ready for the Libellant, your Honor.

Mr. Collins: Ready.

JOSEPH W. KAHIAPO

resumed the stand, and testified further as follows:

The Court: Mr. Witness, I remind you that you are still under oath. I believe we left the sampan with its nose out of water. You may proceed from there.

Direct Examination

(Continued)

By Mr. Quinn:

Q. The last you saw of the sampan Tenyo Maru, Joe, I believe you testified you could see the bow out of the water; is that right? A. Yes, sir.

Q. When you saw that she was awash, did you make any attempt to tow her in that condition? [96]

A. No, sir.

Q. What was the size of the waves in the channel, if you recall?

A. At that time I figured it was about four to five feet.

Q. And the tow was how many feet in back of the tug, about?

A. Before cutting off — before she sank you mean?

Q. Yes.

A. She was about, I would say, about 75 to 80 yards in back of the Kolo.

Q. Seventy-five to eighty yards behind?

(Testimony of Joseph W. Kahiapo.)

A. Yes.

Q. Did you have radio facilities on the Kolo?

A. No.

Q. No radio? A. No, sir.

The Court: This isn't the tug that got lost, is it?

Mr. Quinn: Beg pardon?

The Court: This isn't the tug that got lost, is it?

Mr. Quinn: I don't think so.

The Witness: No. The Momi.

Q. (By Mr. Quinn): Now, Joe, you testified this morning that your orders were to salvage the Tenyo Maru. A. Yes. [97]

Q. And that that was why you took it under tow and took it back to Honolulu; is that correct?

A. That's right.

Q. From whom did you receive those orders?

A. From the port captain and the manager.

Q. Did they make any mention of taking the Tenyo Maru only to Kaunakakai, or any discussion of taking to Honolulu, or any place designation in your instructions at all?

A. No. The only orders I got was to do the best I could up there for the sampan. Being there were no dry dock facilities and that the boat couldn't be repaired at Kaunakakai, I saw it fit to bring the boat back to Honolulu. That is why I undertook the tow to bring it back to Honolulu.

Q. And did you tell John Cho that in the light of your orders you were, in your own mind, authorized to take the tow back to Honolulu?

(Testimony of Joseph W. Kahiapo.)

A. No—well, I understood that everything was fixed between the Company and him and I used my own judgment on that. I told you before that I was inexperienced in that type of job. That was my first salvage job.

Mr. Quinn: I have no further questions.

The Court: Cross-examination?

### Cross-Examination

By Mr. Collins:

Q. You testified that you met Mr. Cho on Sunday afternoon. [98]           A. Yes, sir.

Q. Would you tell us again the circumstances under which you met him?

A. Well, at that time Mr. John Cho was talking to the assistant port captain, and I was there to report for a certain job which I was supposed to handle with the Tug Kolo, and they were talking about his sampan being on the reef and who was going to be there.

Q. And who was present in that discussion?

A. Just John Cho, myself and Hop—Richard O'Neill, assistant port captain.

Q. Mr. Pavao was not there?           A. No, sir.

Q. I believe you also testified that you were scheduled to go over to Molokai on Monday.

A. I did not testify—you said I was scared to go to Molokai?

Q. Weren't you scheduled to go to Molokai on Monday?



(Testimony of Joseph W. Kahiapo.)

A. No, sir, that was my regular job, to go there Monday. I usually go to accept and collect on Tuesday morning, to take it into Kolo harbor. I didn't testify——

Q. Are you regularly scheduled to go to Molokai on Tuesday?

A. On Monday. I usually go there on Monday, I think.

Q. What time do you usually leave on Monday?

A. As soon as we got our stores on board, usually by 9 o'clock, as soon as we get our stores on board.

Q. And what is your usual routine?

A. Well, to proceed to Kolo harbor and lay there overnight and wait for the bigger tugs to come in with their tow, and take away their tow and tow it into Kolo harbor, which is a shallow harbor. The bigger tugs can't bring in there. We were assigned to do that.

Q. After assisting the barge into Kolo harbor, what did you do, normally?

A. We stand by all day long until the barge is loaded, and we secure the tug again for towing and take it back to the big tugs which are usually waiting off port at that time.

Q. And usually come back to Honolulu after assisting the loaded barge out; is that correct?

A. Yes, sir.

Q. So, is it true to say that you normally make a run down to Kolo on Monday——

A. Yes, sir.

(Testimony of Joseph W. Kahiapo.)

Q. Assist with the barge on Tuesday——

A. Yes.

Q. And then return to Honolulu? A. Yes.

Q. And your return trip to Honolulu was normally on what day? [100]

A. Well, sometimes we change our schedules. The port captain says if it is too late and weather conditions doesn't permit to lay off Tuesday night and leave there first thing in the morning, but most of the time we leave there as soon as we secure the barge to the big tug. We usually leave there at that time.

Q. Do you normally make a run at night?

A. Yes, sir.

Q. You do? On this particular schedule? If the barge was unloaded late on Tuesday, would you come up Tuesday night, or would you wait until Wednesday morning?

A. Like I told you, it all depends on the weather.

Q. But if the weather was favorable, you would come up Tuesday night? A. Yes, sir.

Q. Were you given any written instructions at the time that you shoved off on this trip; that is, when you left Honolulu, were you given any written instructions?

A. The only orders that came verbally from the port captain.

Q. No written orders with respect to your duties in connection with the pineapple barge?

A. No, sir.

(Testimony of Joseph W. Kahiapo.)

Q. After this conference on Sunday afternoon, did you see anybody at Young Brothers before you left on Monday morning? [101]

A. Not that I know of.

Q. You didn't receive any instructions from Mr. Pavao or anybody else at that time?

A. Not that evening. Monday morning I did.

Q. You did Monday morning? A. Yes.

Q. And what were your instructions?

A. To go up there and do the best I can for the sampan.

Q. And who gave you those instructions?

A. Captain Pavao.

Q. And that is, in substance, what was said on Sunday, you say? A. Yes.

Q. Then, as I understand you, you went directly to Kaunakakai? A. Yes.

Q. Arriving there sometime on Monday forenoon?

A. It was about—I don't know what time; it was afternoon anyway.

Q. It was afternoon. You looked over the sampan?

A. I didn't go directly to Kaunakakai. I went to Kolo.

Q. You did not go to Kaunakakai at all?

A. No, sir, not on Monday. Wait a minute. Yes. Your Honor, in case I make any mistake, because this incident happened over a year ago. I can not well remember what happened, what [102] took place all the time.

(Testimony of Joseph W. Kahiapo.)

Mr. Quinn: What?

The Court: He said because this incident took place over a year ago he can not remember well everything that happened. He is asking for a moment or two to refresh his recollection.

The Witness: That part I couldn't answer you so well, whether I did go to Kaunakakai or not.

Q. (By Mr. Collins): Maybe we can refresh your recollection.

A. But I have that all marked down in the statement to the Company what happened.

Q. I am afraid I can't hear you.

A. I gave a statement to the Company what happened, the whole incident, the whole record down there, and I also have the records down in my log books, certain time which happened all the way through. I can not give you specific information.

Q. Maybe we can refresh your recollection on this. Don't you recall having spoken to Mr. Cho, being unable to pull the sampan off on Monday because the tide was low? A. Yes, that's right.

Q. So you recall that you went to the harbor there?

A. Yes, but I told Mr. Quinn I didn't go up there Monday. I did go up there Monday. [103]

Q. And after reporting to Mr. Cho that it would be useless to try to tow it off on Monday, what did you do?

A. I proceeded back down to Kolo and stood by for the tug in the morning.

(Testimony of Joseph W. Kahiapo.)

Q. You assisted the barge in to Kolo, did you?

A. Yes.

Q. When it arrived? A. Yes, sir.

Q. Then what happened after you assisted the barge?

A. It was on Tuesday morning.

Q. Tuesday morning.

A. I stood by all day until in the afternoon the Mahoe—I returned back and I took back the barge out to her and the boat proceeded back to Kaunakakai, after getting orders from the skipper of the Mahoe.

Q. The skipper of the Mahoe ordered you to return to Kaunakakai?

A. Yes, sir.

Q. Did his orders consist of anything beyond that?

A. No, sir.

Q. What was your relation to the captain of the Mahoe?

A. My relationship?

Q. Yes. Was he your boss?

A. No, we worked together. I was supposed to work with him up there. He couldn't do nothing up there unless he had a [104] small type of tug like I had.

Q. You went to Kaunakakai after the captain of the Mahoe ordered you to do so?

A. Yes.

Q. And about what time did you arrive there?

A. That was after four o'clock, I presume.

Q. Did the captain of the Mahoe come up, too?

A. Oh, yes, the both of us were there.

Q. About what time did he arrive, do you recall?

A. We came in about the same time.

(Testimony of Joseph W. Kahiapo.)

Q. Did you discuss with him the question of moving the sampan from the reef?

A. Yes, sir.

Q. Did he give you any orders in connection with it? A. Yes, sir.

Q. And what were his orders?

A. To back in as close to the reef as I can and send in my 8-inch line and have those men on board the Tenyo Maru rig my line firmly on the Tenyo Maru stern. And I proceeded in pulling. After doing so for about fifteen minutes, we know we couldn't get any headway. The Mahoe put her line on my bow and we pulled the Tenyo. That is the only way we got the Tenyo Maru off the reef.

Q. At the time you were pulling alone, was the captain of the Mahoe anywhere around? [105]

A. He was standing alongside of my mooring, alongside but further in the deep.

Q. Was he directing you? A. Yes.

Q. Then after you were not able to pull it off, the Mahoe made a tandem hitch; is that right?

A. Yes.

Q. After she was pulled off, what happened?

A. I cast off the Mahoe's line from my bow, pulled alongside the sampan and took it alongside the wharf at Kaunakakai.

Q. Did the Mahoe go in, too? A. Yes.

Q. Did you confer at all with the captain of the Mahoe thereafter?

A. No. Well, he went on board the sampan to



(Testimony of Joseph W. Kahiapo.)

have inspection. Like I told you, I didn't have much experience in inspecting the type of vessel, and so he went ahead to do the inspection job.

Q. I can't hear you.

A. The both of us were on the Tenyo Maru at that time inspecting, but he was the one that was head of the inspection. He went ahead and inspected.

Q. But you did not go on the sampan?

A. I was on the sampan with him, but not doing the inspection. [106]

Q. Did he give you any orders in connection with that sampan?      A. What do you mean?

Q. Any orders with respect to towing it to Honolulu.

A. No, he left it up to me, after he left Kaunakakai at 6 o'clock.

Q. Did he give you any instructions with respect to calling Honolulu?      A. No, sir.

Q. He did not mention that you should telephone either Mr. Harrison or Mr. Pavao?

A. No, sir.

Q. How long did he stay there?

A. He just stayed a little while, until we had supper on board the Mahoe, and then he proceeded back to Honolulu with his store.

Q. Did you tell the captain of the Mahoe that you intended to bring the sampan to Honolulu?

A. Yes, sir.

Q. What did he say?

(Testimony of Joseph W. Kahiapo.)

A. He didn't say nothing.

Q. Did you stay aboard your tug overnight?

A. Yes, we stayed there overnight.

Q. Did you check the sampan at any time during the night?

A. Well, we checked her once, and we found out that she [107] was leaking a considerable amount of water.

Q. When you say "we," whom do you mean?

A. My crew on board the vessel.

Q. But you only checked it once?

A. Yes, well, we checked it, and in order to be on the safe side, we run a bridle, sort of a bridle, from our tug. We were outside and the sampan was inside. We run a bridle under the sampan to the wharf and secured it to our tug, fore and aft, to act as a cradle, so she only go down—if she go down so far.

Q. When did you run that cradle under it? You call it a cradle?      A. Yes.

Q. When was it?

A. Sometime that evening—I don't recall.

Q. Was it as soon as you tied up, or some time after that?      A. No. Some time after that.

Q. Was it before or after the captain of the Mahoe left in the Mahoe?

A. It was after the captain left.

Q. The sampan was being pumped all the time, was it?      A. Yes.

Q. Was that cradle put under there at your

(Testimony of Joseph W. Kahiapo.)

suggestion or at Mr. Cho's suggestion? [108]

A. My suggestion.

Q. On occasions that you observed the sampan, did you find that the water was going down?

A. Well, I think the pump must have stopped, or something, before that, see, and the water came leaking in.

Q. The pump stuck, you say?

A. The pump must have stuck, or something, I don't recall what happened. I was on board our vessel. We were taking a nap at that time.

Q. When you first went in and looked at the sampan, was there much water in it at that time?

A. It was just above the engine clutch.

Q. About how many feet of water was it?

A. About three feet of water.

Q. And when was the next time you looked at it?

A. That was in the morning.

Q. You didn't look at it again until morning?

A. Well, she dried up after we run our cable under and got the pumps going.

Q. How long did it take to dry up?

A. About two hours.

Q. And in the morning she was dry?

A. Yes, with the pumps going full force.

Q. Was she dry at the time—were you there when the pumps were changed? [109]

A. Yes, she was dry at that time when we changed the pumps.

Q. Did Mr. Cho, at any time, say to you that he

(Testimony of Joseph W. Kahiapo.)

had checked with Mr. Harrison and Mr. Pavao in Honolulu either by telephone——

A. No. But before the captain of the Mahoe left, he told me that he had checked with—Mr. Cho checked with the port captain on the tow fee and salvage operation. That gave me an understanding I was supposed to tow that vessel back to Honolulu. That is when I told the captain of the Mahoe I was going to tow the sampan home.

Q. You say the captain of the Mahoe told you that Mr. Cho had told him——

A. No, Mr. Cho had a verbal conversation on the telephone with the port captain in Honolulu on towing fee. That gave me an understanding that I was supposed to tow the sampan back to Honolulu.

Q. Before that time you were not sure whether you were supposed to or not?      A. Yes, sir.

Q. You were not sure; is that correct?

A. Yes, sir.

Q. And when did you first hear of this telephone conversation?

A. That was just before the Mahoe skipper left with his [110] tug to Honolulu.

Q. Did you speak to Mr. Cho yourself about that?      A. No, sir.

Q. You never inquired of him as to whether he had made the telephone call or what had been said in the conversation?

A. No, I was taking my orders from the captain

(Testimony of Joseph W. Kahiapo.)

of the Mahoe all the time because Mr. Cho was all the time busy with the sampan, getting pumps and having men run the pumps, and all the odds and ends.

Q. Did the captain of the Mahoe tell you to bring it up, or did you tell him?

A. I told him. He asked me if I was going to tow it back, and I said 'yes.'

Q. He did not give you an order?

A. That is what I told you; I took an understanding that because Mr. Cho and the port captain were talking of towing fees, it was my understanding I was to tow the sampan home, but he did not order me. If he had orders I was not supposed to tow the sampan home, he would have told me then and there, because I had had no orders from Honolulu not to tow it home. My orders were to do the best I can for the sampan.

Q. How long had the new pump been aboard before you finally took the sampan under tow?

A. Oh, I figure about a little over an hour, or something.

Q. Did you observe its operations? [111]

A. Yes, she was pumping all right.

Q. Working satisfactorily?

A. Yes, sir. She was a bigger pump than the one they had previously.

Q. It was not running continuously, was it?

A. Well, we run it until the water got so low—below the pumping hose, and then we stop the pump,

(Testimony of Joseph W. Kahiapo.)

and then when the water starts rising up, we continue pumping again. In other words, the pump was pumping the water out faster than it was coming in.

Q. Was the cradle kept under the sampan until you took it in tow?

A. No. In the morning we took out the cradle because we saw she was out of danger of sinking.

Q. About what time in the morning?

A. The cradle was only left there for the safety reason. We had to go to bed. We had only one man on watch. In case she go down fast, she would stay afloat.

Q. And that man was on the sampan or tug?

A. On the sampan. There were three men on the sampan, but one of them stood watch.

Q. In the morning, as soon as you saw the water was low in the hull, you took the cradle off from under it?

A. Yes, sir.

Q. Did you have any discussion with Mr. Cho on Wednesday [112] morning in connection with the tow to Honolulu?

A. Well, I asked him what was the best thing. He figured it was all right to tow it back, but before that we tried to dry dock her out there, and they got the crane, and the crane couldn't lift her aboard. We tried to get divers to go under and plug up the hole, but it was too risky a job, so we figured it was the best thing to bring her home.

Q. When you say "we figured," does that mean you or Mr. Cho?



(Testimony of Joseph W. Kahiapo.)

A. I figured it mostly, because I wanted to complete my part of the deal and I didn't want to leave a disabled craft in Kaunakakai harbor, and later be sunk in there.

Q. The only discussion you had with Mr. Cho that morning was the discussion that resulted in this decision to tow it to Honolulu; is that correct?

A. Yes, sir.

Q. Did you make any inquiry about the number of men that were on the sampan, or who had been on the sampan on the trip?

A. Well, I made sure that there was at least two or three men on board the vessel to run the pumps on the way home, because we have to have somebody to stand by the pumps.

Q. Did you know how many hand pumps they had on board?      A. No, sir, not at that time.

Q. Did you talk to the captain of the sampan about the [113] tow?

A. It was all up to the owner.

Q. Before you started off, did you have any discussion with a Mr. Kalani?

A. Well, the only discussion we had was about signaling back and forth to each other.

Q. What was the substance of that?

A. Well, I told him that I was going to look back and wave back to them at half-hour intervals just to see if everything is all right, to keep a man posted so they could watch the tug.

Q. They were to signal you every half hour?

(Testimony of Joseph W. Kahiapo.)

A. No, I was to signal to see if everything was all right?

Q. How? A. By hand raising, that is all.

Q. And he was to answer? A. Yes.

Q. Did you signal every half hour you were under way?

A. We could plainly see. I seen the vessel was riding high. We signaled every little while, sometimes it is less than half hour's time.

Q. Were you in a position where you could watch the operations of the pump?

A. Well, we could see the pump—we could see the water [114] coming out from the pump.

Q. The sampan was always in a position where you could observe that? A. Yes, sir.

Q. From your observations, how was the pump working?

A. Well, the pumps were working, and when we see the pumps go off, we would signal back to them to see whether they were all right or on the blink.

Q. They went on and off?

A. When they pumped off all the water, they shut it off, and when it filled up with a certain amount of water, they would start pumping again.

Q. And when was the first time you observed that the sampan was taking more water than she could handle?

A. That was just before going to the bow before I noticed.

Q. Just before where?

(Testimony of Joseph W. Kahiapo.)

A. Just before I went to the bow.

Q. You mean this happened between these half-hour signals?

A. No. I told you before that it went down so fast we didn't know what time interval it was when it happened.

Q. Was any signal given from the sampan that she was in trouble?

A. Just when I turned around and found out she was sinking. [115]

Q. How did they give you that signal?

A. They didn't signal at all. She went down so fast, they were signaling for me to come back.

Q. The last signal you received from the sampan was that everything was all right; is that right?

A. Yes, sir.

Q. When you first observed that she was going down, could you give us some idea as to what her position was with respect to the water, what portion was above water?

A. She was all the way down to the gunwales.

Q. That means that the entire main deck was awash?

A. Yes, sir, and I continued towing her full speed, trying to upright her bow and empty a little water out, and it didn't do any good. She kept going down further and the crew was calling me to come back and pick them up.

Q. But the first time you knew anything was wrong was when you saw her decks awash?

A. Right.

(Testimony of Joseph W. Kahiapo.)

Q. You had received no word from the sampan prior to that time that everything was not right?

A. Everything was all right five minutes before that.

Q. Did the men on the sampan shout anything over to you; could you hear them?

A. I can't hear them from a distance.

The Court: Could? [116]

The Witness: Couldn't hear them from a distance.

Q. (By Mr. Collins): Did the men on the sampan jump from her, dive into the water, before you cut your line?

A. No, I cut my line before they went overboard.

Q. What was her position at the time you cut the line? A. About 20 feet astern of me.

Q. What was the position of the sampan—what portion was out and what under water?

A. Well, the cabin deck was above the water. About half of it was awash. It was sort of an angle, that part of the bow was out of the water. The men were clinging to the submerged part of the cabin.

Mr. Collins: That is all.

The Court: Redirect?

Redirect Examination

By Mr. Quinn:

Q. Joe, just one or two questions. You stated that you could see the pumping going on and now and then the pumping would stop.

A. Yes, sir.

(Testimony of Joseph W. Kahiapo.)

Q. And I believe you then stated that when they got all the water out, they would stop pumping, and that is the explanation for that. You don't know why the pumping was stopping at that time, do you? I mean, you assumed it was because they got the water out? [117]

A. Yes, sir.

Q. But you didn't get to see it or talk to anybody to find out what the status of the water in the sampan was at the time the pump stopped, did you?

A. Yes, sir.

Q. You weren't able?

A. I weren't able.

Q. Do you know where the sponsons are in the sampan?

A. Sponsons? No.

Q. A sampan has a part that protrudes off the hull on either side up toward—

A. You mean the protruding part of the gun-wales?

Q. Yes.

A. Yes.

Q. Now, up forward, that was out of the water; is that correct?

A. Yes, sir.

Q. And about how many feet freeboard did it have forward, if you can tell?

A. We figured about—she was sticking out of the water about four feet?

Q. Four feet?

A. Yes.

Q. That is at the very bow?

A. At the very tip of the bow, yes. [118]

Q. And at the cabin how many feet freeboard did it have?

(Testimony of Joseph W. Kahiapo.)

A. Well, after I got those men on board, we noticed the cabin was awash because she went up that way and only that part of the bow was up. Just the cabin. Down here she was submerged.

Q. The deck aft was awash then; is that right?

A. Yes.

Q. What is the normal freeboard on a sampan up at the bow, do you know?

A. You mean a regular draft; I don't know for that type of boat.

Mr. Quinn: I have no further questions.

Recross-Examination

By Mr. Collins:

Q. You did notice, Mr. Kahiapo, that the sampan, when she was behind you — that the pump would start and would stop? A. Yes.

Q. About how many times would you say that it started and stopped, as best you could judge?

A. That I don't know.

Q. Would you say four or five times, roughly?

A. It could be more than that.

Q. Would it be more than once or twice?

A. I would figure less than three or four times.

Q. Three or four times.

Mr. Collins: That is all, your Honor. [119]

The Court: All right, you are excused. Next witness.

(Witness excused.)

Mr. Quinn: Mr. Abell, please.



EBERESTO ABELL

called as a witness on behalf of the Libellant, being first duly sworn, was examined and testified as follows:

The Clerk: Just sit down, please.

The Court: Will you please state your name?

The Witness: Eberesto Abell.

The Court: How do you spell it?

Mr. Quinn: (Spelling) E-b-e-r-e-s-t-o.

The Court: And the last name is what?

The Witness: Abell. (Spelling) A-b-e-l-l.

The Court: How old are you?

The Witness: Forty-four.

The Court: Forty-four?

The Witness: Yes.

The Court: Do you live here in Honolulu?

The Witness: Yes.

The Court: Are you employed?

The Witness: What?

The Court: Where do you work?

The Witness: I work fishing.

The Court: You work fishing?

The Witness: Yes. [120]

The Court: On what boat?

The Witness: Likelike.

The Court: Who owns that?

The Witness: Half Pake, half Hawaiian.

The Court: What is his name?

The Witness: Likwai.

The Court: Are you a citizen of the United States?

(Testimony of Eberesto Abell.)

The Witness: No.

The Court: Citizen of the Republic of the Philippines?

The Witness: I don't know.

The Court: Where were you born?

The Witness: I was born in the Philippines.

The Court: All right. Take the witness. You are going to have to speak good and loud so the gentlemen sitting down there can hear you, too. I take it if you are a fisherman you have occasion to shout above the sound of the motor of your boat, so I know you can talk good and loud here so we can all hear you. There is nothing to be afraid of. Just listen to what the lawyers ask you, make sure you understand their questions, and answer the questions if you can.

### Direct Examination

By Mr. Quinn:

Q. Mr. Abell, can you talk as loud as I am talking now? A. Yes.

Q. Let me hear you. [121]

The Court: Give him something to work on.

Q. (By Mr. Quinn): You talk just the way I am talking now so everybody can hear you.

Where were you working last year?

A. Last year I work Young Brothers.

Q. What did you do at Young Brothers?

A. Deck hand.

Q. Deck hand? A. Yes, sir.

Q. What boat? A. Kolo.

(Testimony of Eberesto Abell.)

Q. Do you know Joe Kahiapo?

A. Yes, captain of the boat.

Q. He was your captain? A. Yes.

Q. Do you know the boat Tenyo Maru?

A. Yes, I know from Kaunakakai, he pull him out Honolulu. Then between Honolulu and Kaunakakai sink down, but he no sink down.

Q. On the way back from Kaunakakai she went down?

A. She sink down between Honolulu and Molokai.

Q. About how far down?

A. About the level of the deck.

Q. Level with the deck? A. Yes. [122]

Q. What did Joe do?

A. Joe he said more better cut. I told Joe more better not cut, it afloat yet. This guy a little bit scare, and he cut the line.

Q. Go ahead.

A. So he cut the line and turn back and pick up the men and he come back to Honolulu on this boat. He left it in the channel.

Q. You thought it was better not to cut the line?

Mr. Collins: I object to that question.

Mr. Quinn: He said that and I am trying to get back to that point. I am trying to lead him. I think the record will show he has said that once.

The Court: I thought he did, too.

Mr. Collins: I would wish to have the question on his thoughts stricken, if your Honor please.

(Testimony of Eberesto Abell.)

The Court: Let us first of all read back exactly what he said, so we can all have the benefit of it. There was some discussion between the captain and himself as to what was better to do.

(Answer read.)

Q. (By Mr. Quinn): Why did you tell Joe not to cut the line?

A. I tell him more better no cut; she no sink, I think; it floating, the boat. [123]

Q. How long have you been on boats?

A. A line about 40 feet.

The Court: The question is: How long have you been on boats? How many years have you been at sea?

The Witness: Who? Me?

The Court: Yes, you.

The Witness: About eight months for Young Brothers.

Q. (By Mr. Quinn): About eight months for Young Brothers. How much longer before that? How long on boats before you worked for Young Brothers? A. Last year, 1948.

Q. Have you ever been on a sampan?

A. I work sampan. Three months I work sampan, and then I quit for Young Brothers.

Q. What did you do before you worked for Young Brothers?

A. Deck hand with pineapple.

Q. Deck hand with pineapple? A. Yes.

Q. How long with the Pineapple Company?

(Testimony of Eberesto Abell.)

A. I forget the time.

Q. How many——

A. I work for Young Brothers first time for seven years.

Q. What did you do before you worked for the Pineapple Company?

A. I work deck hand for tug. [124]

Q. Deck hand for tug? A. Yes, sir.

Q. How long?

A. First time I work seven years.

Q. Did you think——

Mr. Collins: Shall I object at this point, your Honor?

The Court: You could almost cut that one with a knife.

Q. (By Mr. Quinn): Did you think that the sampan could have been towed?

Mr. Collins: I object, your Honor——

A. No.

Mr. Collins: (Continuing) ——on the basis that this man has not been qualified as an expert and therefore can not give an opinion on it. The answer calls for an opinion.

Mr. Quinn: If the Court please, the *only* a person could become an expert, knowing the characteristics of sampans and boats when they are under tow, is by having been a deck hand or otherwise engaged in tug work and in maritime conditions. This man instinctively told Joe Kahiapo, don't cut the line. Now, I think his opinion is of value.

(Testimony of Eberesto Abell.)

Maybe if the Court doesn't feel he is the best expert that could be gotten on this, that would go to the weight, but certainly he is entitled to give his opinion. [125]

Mr. Collins: If your Honor please, this has to do, apparently, with the condition of the sampan. There was no evidence that this man has ever worked on a sampan, ever towed on a sampan and, as far as the questions are concerned, has been near a sampan. The work on the pineapple barges, we think, would not qualify him at all to speak on sampans. And there is no evidence that the tug work he was doing was any more than the tug work of pushing ships around.

The Court: I think he has already ventured the opinion that you wish to have him express, and I don't think you have laid an adequate foundation for him to express an opinion as an expert on towage. The objection is good.

Mr. Quinn: Thank you.

Q. (By Mr. Quinn): How did Joe act when he went to cut the line?

A. I don't know. Him do it. Joe the captain; that his business.

The Court: Can you speak a little bit more distinctly so we can all hear you the first time. I understood from the Clerk, who caught what you said, that you said you don't know; Joe is the captain; that is his business.

The Witness: I no business, because him business cut.



(Testimony of Eberesto Abell.)

Q. (By Mr. Quinn): Did Joe say why he cut the line?

A. I don't know, see; him business. I no business talk [126] to him; him no afraid of me; him boss because him captain.

The Court: Didn't you say somebody was afraid of you?

The Witness: No.

The Court: You used the word "afraid."

The Witness: Him boss to hold the line for the boat to come home.

Mr. Quinn: If the Court please, I wonder if it isn't within the discretion of the Court at this time to give me the right to lead the witness, not on the ground of a hostile witness, but close enough to it, in the interest of getting the truth in this admiralty action.

The Court: Well, I will grant we are all having a little difficulty in hearing exactly what the man says, but I think he understands your questions. I gather very distinctly that his attitude is he doesn't want to express an opinion as to what he might have done because, after all, he was just an employee under the captain, and it was the captain's business to know what to do and why he did it. Isn't that about what you are trying to say?

The Witness: That is right, sir.

The Court: And he doesn't want you to put him in an embarrassing position.

(Testimony of Eberesto Abell.)

Mr. Quinn: Very well, your Honor.

The Court: In the interest of getting along, if you [127] can clarify the questions in some way so that we can make more rapid progress, I will see how that gets along.

Q. (By Mr. Quinn): Did Joe say that he was afraid something might happen to the Kolo if the line was not cut?

A. He hold the steer for the boat. He hold them for the steer. He look to behind, but the boat it sink. I think Joe a little bit scared; that is why he cut the rope at that time. So I told him, Better no cut because it still float, I told him; but him cut. And I talk no more because it was him business.

Mr. Collins: If your Honor please——

The Court: Wait just a minute. But first, will you read it.

(Answer read.)

Mr. Collins: I want that portion having to do with what this witness thought that the captain thought stricken as being hypothetical.

The Court: It is quite obvious to me that we are getting an expression of this man's opinion. I think I can evaluate rather than strike it. I will let it stand and give an exception.

Incidentally, I am trying to acquire some concrete knowledge of admiralty. In anticipation of this case I did some reading, and I ran across an authority to the effect that objections don't seem to have much weight in admiralty, that evidence

(Testimony of Eberesto Abell.)

can [128] come in on appeal; they have the right *de novo* as far as the Supreme Court of the United States. If that be sound, I don't know what good it does to object or why I should rule on objections.

Mr. Quinn: I think your Honor has taken a slight misinterpretation of the authorities you have read. That is certainly true as far as pleadings are concerned, that they will amend pleadings before, during, or after trial or on appeal, at any time, in the highest appellate court, but I do believe that the Court has the right to restrict the evidence.

The Court: Well, it would seem so to me, or you could bring in everything and never stop.

Mr. Quinn: I have no further questions of Mr. Abell.

Mr. Collins: I have no questions, your Honor.

The Court: All right. You are excused. Thank you.

(Witness excused.)

Mr. Quinn: I next call Mr. Kagimoto.

The Court: Before we hear him, we will take a short recess during which I would like to see both of you in Chambers on an irrelevant matter.

(Recess had.)

Mr. Quinn: If the Court please, at this time I would like to offer in evidence a bill of sale. I think that is satisfactory to you?

Mr. Collins: Yes. [129]

Mr. Quinn: Without further identification.

The Court: Very well, it may be received by agreement.

The Clerk: As Libellant's No. 1.

(Thereupon, the document above referred to was marked Libellant's Exhibit No. 1 and received in evidence.)

### LIBELLANT'S EXHIBIT No. 1

United States Customs Service Bill of Sale of licensed vessel under 20 tons.

Kong Paik Woon, also known as John Pac Un Kong and James Anderson to Young Kun Cho, Oil Screw, called the Tenyo Maru.

Customhouse, Honolulu, Aug. 16, 1946.

[Seal]      /s/ [Illegible]

Deputy Collector of Customs.

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The United States of America  
United States Customs Service  
Bill of Sale of Licensed Vessel Under  
Twenty Tons

To all to whom these Presents shall come, Greeting:

Know Ye, That Kong Paik Woon, also known as John Pac Un Kong, 947 Wawamalu Road, Honolulu, Territory of Hawaii, owning 50%, and James Anderson, 432 Kaliamoku Street, Honolulu, Territory of Hawaii, owning 50%, the sole owners

of the Oil Screw or vessel called the "Tenyo Maru" of the burden of nine (9) net tons, or thereabouts, for and in consideration of the sum of Six Thousand and No/100 (\$6,000.00) dollars, lawful money of the United States of America, to them in hand paid, before the sealing and delivery of these presents, by Young Kun Cho, 727 Palani Avenue, Honolulu, T. H., Sole Owner, the receipt whereof they do hereby acknowledge and they being therewith fully satisfied, contented, and paid, have bargained and sold, and by these presents do bargain and sell, unto the said Young Kun Cho, 727 Palani Avenue, Honolulu, T. H., Sole Owner, his heirs, executors, administrators, and assigns, the whole of the said Oil Screw or vessel, together with all of the masts, bowsprits, sails, boats, anchors, cables, tackle, furniture, and all other necessities thereunto appertaining and belonging; the License of which said Oil Screw or vessel is as follows, viz:

True Copy of the Latest License

The United States of America

Treasury Department, Bureau of Customs

Permanent License No. 8.

Official No. 238590.

Measured at: Honolulu, 1939.

Number of Crew, excluding Master: 3.

Horsepower: 30.

Type of engine: Oil.

License of Vessel Under Twenty Tons

In Conformity to Title L, "Regulation of Vessels in

Domestic Commerce," of the Revised Statutes of the United States,

Kong Paik Woon, Managing Owner, having taken and subscribed the oath required by law, and having sworn that Kong Paik Woon, 947 Wawamalu Road, Honolulu, Territory of Hawaii, owning 50%, and James Anderson, 432 Kaliyamoku Street, Honolulu, Territory of Hawaii, owning 50%, are citizens of the United States and the sole owners of the vessel called the Tenyo Maru of Honolulu, and that the said vessel was built in the year 1921, at Honolulu of wood as appears by Permanent License Number 10 issued at Honolulu, December 2, 1943, now surrendered; property changed, and said license having certified that the said vessel is an Oil Screw; that she has one deck, one mast, a clipper head, and a square stern; that her register length is 48.1 feet, her register breadth 10.7 feet, her register depth 5 feet, that she measures as follows:

Tons, 16.78.

Gross Tonnage, 16.78.

Deductions under Section 4153, Revised Statutes, as amended (Section 77, title 46, United States Code):

Crew space, 1.36.

Boatswain's stores, .23.

Propelling power (actual space, 2.94), 32%.

Total Deductions, 6.96.

Net Tonnage, 9.

The following-described spaces, and no others,



have been omitted, viz: Forepeak...., aftpeak...., other spaces (except double bottoms) for water-ballast....; open forecastle...., open bridge...., open poop...., open shelter-deck...., cabins...., companions...., galley...., skylights...., wheel-house...., water-closets....; anchor gear...., condenser...., donkey engine and boiler...., steering gear...., light and air over propelling machinery 1.22, other machinery spaces.....

Proof being had of her admeasurement, she shall not be employed in any trade while this license shall continue in force whereby the revenue of the United States shall be defrauded, and the master having also sworn that this license shall not be used for any other vessel, or for any other employment than is herein specified: License is hereby granted for the said vessel to be employed in carrying on the Mackerel Fishery for one year from the date hereof, and no longer.

Given under my hand and seal, at the Port of Honolulu, in the District of Hawaii, this 2nd day of November, in the year One Thousand Nine Hundred and Forty-five (1945).

H. PELATOWSKI,

Deputy Collector of Customs.

To have and to hold the said Oil Screw "Tenyo Maru" and appurtenances thereunto belonging unto him, the said Young Kun Cho, his heirs, executors, administrators, and assigns, to the sole and only proper use, benefit, and behoof of himself the said Young Kun Cho, his heirs, executors, administra-

tors, and assigns forever: And they, the said Kong Paik Woon, also known as John Pac Un Kong and James Anderson, have promised, covenanted, and agreed, and by these presents do. . . promise, covenant, and agree, for their heirs, executors, administrators, and assigns, to and with the said Young Kun Cho, his heirs, executors, administrators, and assigns to warrant and defend the said Oil Screw or vessel and all the other before-mentioned appurtenances against all and every person and persons whomsoever.

In testimony whereof, The said Kong Paik Woon, also known as John Pac Un Kong, and James Anderson have hereunto set their hands and seals this 13th day of August, in the year of our Lord one thousand nine hundred and forty-six (1946).

Signed, sealed, and delivered in presence of—

/s/ N. KOJIMA.

[Seal] /s/ KONG PAIK WOON,

[Seal] /s/ JAMES ANDERSON.

Territory of Hawaii,  
County of Honolulu—ss.

Be It Known That on this 13th day of August, 1946, personally appeared before me, Kong Paik Woon, also known as John Pac Un Kong, and James Anderson, to me known to be the persons described in and who executed the foregoing instrument, and acknowledged the within instrument to be their free act and deed.

In Testimony Whereof, I have hereunto set my hand and seal this 13th day of August, A.D. 1946.

[Seal]      /s/ NOBORU KOJIMA,  
Notary Public, First Judicial Circuit, Territory of  
Hawaii.

My commission expires June 30, 1949.

Admitted April 5, 1949.

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Mr. Quinn: Which will show the title in Young Cho, who is also John Y. Cho, the Libellant in this case.

The Court: The article sold for the Tenyo Maru?

Mr. Quinn: Yes, your Honor.

At the present time I have Mr. Kagimoto as a witness, who understands English but does not speak it, your Honor, and we have brought Mr. Koichi Kubo, who can translate Japanese into English, provided he meets the Court's approval as an interpreter. I wonder if the Court would like to ask Mr. Kubo some questions.

The Court: I don't understand Japanese. I am sure that he is satisfactory, if he is satisfactory to the Libellee.

Mr. Quinn: If it satisfies the Court——

Mr. Collins: If the Court is satisfied, the Libellee will abide by the Court's judgment.

The Court: I think we can tell best as we go along. Will you come forward and give your name to the reporter?

The Interpreter: Koichi Kubo. [130]

(The Interpreter, Koichi Kubo, was there-upon duly sworn.)

## JIROMATSU KAGIMOTO

called as a witness on behalf of the Libellant, being first duly sworn, was examined and testified as follows (through Interpreter, Koichi Kubo, duly sworn):

The Court: Have you ever interpreted in court before?

The Interpreter: No, I never did, sir.

The Court: Well, first of all, speak clearly and distinctly, and your only function is to act as sort of a machine. You take the English question and translate it exactly into Japanese so that the witness may understand it; and when he answers the question, regardless of whether it makes sense to you or not, you take his Japanese words and turn them back into English, so we can hear what he did say.

The Interpreter: Yes, sir.

Mr. Quinn: Mr. Kubo, I will address the question direct to Mr. Kagimoto and then you translate it.

The Interpreter: All right.

## Direct Examination

By Mr. Quinn:

Q. Will you state your name, please?

A. Jiromatsu Kagimoto.

Q. What is your occupation, Mr. Kagimoto?

A. Fisherman. [131]

Q. Where do you live?

A. 1516-A Emma Street.

The Court: Honolulu?

(Testimony of Jiromatsu Kagimoto.)

The Witness: Honolulu.

Q. (By Mr. Quinn): What is your citizenship, Mr. Kagimoto? A. American citizen.

The Court: Then why can't you speak English?

The Witness: Was in Japan when I was small.

The Court: Never too old to learn. Are you a citizen of the United States exclusively, only, or are you also a subject of Japan?

The Witness: During the war it was cut.

The Court: All right.

Q. (By Mr. Quinn): How long have you been a fisherman, Mr. Kagimoto?

A. From 1930 to 1941; from '46 up to this date.

Q. During that time for many years have you fished from sampans?

A. On a sampan right along, sir.

Q. All the time. Do you own a sampan?

The Interpreter (Interpreting): He owns one-third of a share of a boat.

Q. How long has he owned that third of a share?

A. Ending of August, 1946, up to now. [132]

Q. Did he ever own any sampan in the period 1930 to 1941?

The Interpreter: In 1939 him say he bought a boat.

Q. What is the name of the sampan you bought in 1939? A. Shin Toku Maru.

Q. Mr. Kagimoto, are you familiar with the characteristics of a sampan when it is partially submerged?

A. (The Interpreter): Well, he said he had a

(Testimony of Jiromatsu Kagimoto.)

previous experience with the Shin Toku Maru. Says she was rammed by an AKA boat and the bow was ripped off and she was towed in, Kewalo Basin.

Q. Mr. Kagimoto, when the bow was ripped off, did the Shin Toku Maru take water?

A. She was flooded.

Q. Did you know the ship Tenyo Maru?

The Interpreter: Yes, he says he has seen Tenyo Maru.

Q. Was that ship the same size and general construction as the Shin Toku Maru?

The Interpreter: He says he is not sure, but just by looking, approximately it is about the same idea.

Q. Where is the Shin Toku Maru now?

A. It is in Honolulu, and it is owned by one of the teachers at University of Hawaii.

Q. And what is the name of the Shin Toku Maru now? A. Elena. [133]

Q. Mr. Kagimoto, if a sampan has a leak in its bottom so that its decks are awash, and it has some three or four foot freeboard in the bow, do you think that such a sampan can be towed to safety?

Mr. Collins: If your Honor please, I don't believe that contains all the necessary items for a hypothetical question if intended to be directed to this particular case. There is no mention made of conditions at sea or any other important factors that must necessarily influence the answer to such a question.



(Testimony of Jiromatsu Kagimoto.)

The Court: It is a little skimpy.

Mr. Quinn: If the Court please, we have put into that question, I believe, sufficient to get the general characteristics of a sampan, which is the first question. I want. In other words, the sampan is a very unusual boat in that very regard. It has the sponsons and a great deal of extra wood in it for the sole purpose of not being sinkable. Now, the average type of pleasure craft, or other vessel, is heavy enough for its buoyancy that when it fills with water, irrespective of the sea or wind conditions, it is going to go down, whereas a canoe, on the other hand, on a sampan fills full of water and stays on the surface. My question is directed to that characteristic of the sampan which exists irrespective of sea or wind.

The Court: All right. [134]

Mr. Collins: May we have an exception, your Honor?

The Court: Yes. It is allowed as a general question, and it is recognized that it does not take into consideration all the factors here involved; as a general question, hypothetical in nature.

Mr. Quinn: As to the characteristics of the sampan, yes, your Honor.

The Court: Do you have the question in mind? First let the reporter read it.

(Question read.)

The Interpreter: Well, he said he don't know about these other boats, but according to his boat,

(Testimony of Jiromatsu Kagimoto.)

the bow was all broken off so the deck was awash, but then it didn't sink, he says.

Q. (By Mr. Quinn): What sort of an engine did the Shin Toku Maru have?

A. At least 30 horsepower.

Q. Mr. Kagimoto, are you familiar with usual wave conditions in the Molokai Channel?

The Interpreter: He said he cannot say because today it may be rough and tomorrow it may be calm.

Q. Mr. Kagimoto, are you familiar with the usual wind conditions in the Molokai Channel?

The Interpreter: He says it is hard to estimate but then it is much calmer than north of Oahu, he says. [135]

Mr. Quinn: Where is Barbers Point?

The Interpreter: Barbers Point is northwest, isn't it?

Q. (By Mr. Quinn): Mr. Kagimoto, if a sampan had a leak in its bottom so that its decks were awash and so that it had three to four feet freeboard in the front and were being towed in the Molokai Channel where there were waves of three to four feet and where the wind conditions were a little bit more strong than usual, do you think that that sampan could be safely towed to Honolulu?

Mr. Collins: I object to that question, your Honor. We have not located the sampan any place but in Molokai Channel. It might be many miles

(Testimony of Jiromatsu Kagimoto.)

from Honolulu; it might be quite close to Honolulu; and I believe that would be a very important consideration in answering that question.

The Court: Yes, and it also assumes now that he knows something about tug boats and the skill of towing.

Mr. Quinn: I don't think it does, your Honor. If it is ambiguous in that respect, I would withdraw it and reframe it. The question is directed not so much to the skill of towing, which is, of course, in issue here, but the question of whether or not the sampan will sink under those conditions as described when it is under motion, or whether it is possible to keep it in motion and move it toward a safe harbor. That is the aim and end of the question. [136]

The Court: Well, as I listened to the question, the thing that bothered me was that it took him into the realm of the skill of towing; and, as Mr. Collins says, a lot depends on where it is in the channel.

Mr. Quinn: If the Court please, I will amend the question to add to it that element of distance and location in the channel, and perhaps I will just reframe the question to exclude any idea of the towing skill of this witness.

The Court: All right.

Q. (By Mr. Quinn): Mr. Kagimoto, do you know where Laau Point is?

The Court: Spell it?

Mr. Quinn (Spelling): L-a-a-u.

(Testimony of Jiromatsu Kagimoto.)

The Interpreter: He says he never been at that point.

Q. (By Mr. Quinn): Do you know where the point of Molokai is, which is closest to the Island of Oahu?

The Interpreter: He said that it is a point over there they call kita no hana. It is a north point.

Q. Mr. Kagimoto, is there a light on that point?

A. No light, sir.

Q. Mr. Kagimoto, what is the name of the point that you pass in proceeding from Molokai to Honolulu, the last point before you enter the middle of the channel?

The Interpreter: He says kita no point is the last point. [137]

Q. What?

The Interpreter: Kito no hana is the last point because, he say, the way they fish is northwest of that side.

Q. Now, Mr. Kagimoto, if a sampan is in Molokai Channel between eight and ten miles from the point closest to Oahu, and if its decks are awash and its bow has three to four feet freeboard, and if there are waves of three to four feet high and winds a little stronger than normal in the channel, and if that sampan is taken under tow so that it is moving, in your opinion will that sampan stay afloat?

The Interpreter: Well, he says he don't know about somebody else's boat, but through his own experience, he say, a little wind won't bother, but

(Testimony of Jiromatsu Kagimoto.)

bigger waves will bother, will hamper, but as far as whether that boat will sink or not, he cannot say, because that is not his boat and he wasn't there, but his boat didn't sink easy.

Mr. Quinn: Your witness.

Cross-Examination

By Mr. Collins:

Q. How far off Barbers Point was your sampan when it was rammed?

The Interpreter: About a mile out, he said.

Q. Was the sampan in the lee of the island?

The Interpreter: He say about a mile west from Barbers Point, so it would be on the leeward side, he said. [138]

Q. On the leeward side. Are you familiar with any other sampan that has been similarly rammed or has flooded to that extent?

The Interpreter: He don't know.

Q. He does not.

Mr. Collins: That is all.

Redirect Examination

By Mr. Quinn:

Q. From the point on Barbers Point where your boat was rammed, where was it towed?

A. Kewalo Basin, sir.

Q. Did you ever hear of a boat called the Kasuga Maru?

A. Before the war or after the war, sir?

Q. After the war.

(Testimony of Jiromatsu Kagimoto.)

Mr. Collins: May I ask the object of that question?

Mr. Quinn: Yes. I think it might serve to refresh the recollection of this witness as to other sampans that have similarly stayed afloat after they have had a hold full of water.

Mr. Collins: Well——

The Court: It ties into your question of the same nature, a boat bearing that name after the war.

Mr. Quinn: Did you get the question?

The Interpreter: He says if that was the boat that was lost and owned by "Bull" Haines; is that it?

Mr. Quinn: That is the boat I refer to. [139]

The Interpreter: He seen the boat and he heard about the boat.

Q. (By Mr. Quinn): What happened to that boat, Mr. Kagimoto?

Mr. Collins: Your Honor, I object to that question unless there is some evidence brought out to show that this witness has any first-hand information in connection with that. If he has only heard people talking about it, I think it would be hearsay of the rankest order.

The Court: Yes, I think first we should know if he does know of his own knowledge.

Mr. Quinn: I think, your Honor, he just said he has heard about it and has seen the boat. I believe that was the recent answer there.



(Testimony of Jiromatsu Kagimoto.)

The Court: Heard about what? And saw it when? After something happened to it?

Mr. Quinn: That is what I would like to find out.

The Court: Well, I know you are having difficulty. Let me ask this question and see if we can get ahead. Well, will you read the question again.

(Question read.)

The Court: If you know.

The Interpreter: Well, he said he don't see the boat around and he thinks he read in the paper that it was lost at sea. [140]

Mr. Quinn: No further questions.

Mr. Collins: No questions.

The Court: You are excused. Thank you very much.

(Witness excused.)

The Court: Next witness.

Mr. Quinn: Mr. Matsumoto.

### YOSHINOBU MATSUMOTO

called as a witness on behalf of the Libellant, being first duly sworn, was examined and testified as follows:

The Clerk: Sit down, please.

The Court: Are you left-handed?

The Witness: Yes, I am left-handed.

The Court: What is your name?

The Witness: Yoshinobu Matsumoto.

The Court: How old are you?

(Testimony of Yoshinobu Matsumoto.)

The Witness: Twenty-seven.

The Court: Do you live here in Honolulu?

The Witness: Yes.

The Court: What is your occupation?

The Witness: Carpenter.

The Court: Employed by someone?

The Witness: Yes, right now I am employed by Pacific Construction Company.

The Court: And you are a citizen of the United States?

The Witness: Yes. [141]

The Court: Only?

The Witness: Only.

The Court: Take the witness.

#### Direct Examination

By Mr. Quinn:

Q. Mr. Matsumoto, where were you employed in 1945?

A. I was employed by the San Francisco Commercial Fishing Company and Salvage Company.

Q. San Francisco Commercial Fishing——

A. Commercial Fishing and Salvage Company.

Q. Have you ever been employed in the business of building and repairing boats?

A. That was the business for this Company were building and repairing.

Q. That was the business for that Company. For how long had you been engaged in that sort of occupation?

A. At 1945, or at present? You mean in 1945?

(Testimony of Yoshinobu Matsumoto.)

Q. Yes.

A. In 1945 it was about ten years.

Q. Ten years? A. In 1945; started in 1935.

The Court: You yourself had worked at it for ten years?

The Witness: Yes, because the family has a business and we work off and on. [142]

Q. (By Mr. Quinn): Is that the business known as the Ala Moana Work Shop?

A. At present it is.

Q. At present it is known as that. Are you familiar with the vessel known as the Tenyo Maru?

A. Yes.

Q. Did you ever do any work on the Tenyo Maru?

A. Yes, in '45 we did considerable work on it.

Q. Can you give us some idea of the nature and extent of the work that you did at that time?

A. Well, repairing the sides and bottom of the ship, you know, and putting a new cabin on it.

Q. Would you say it was a major repair job?

A. It is a major repair job.

Q. When you completed that job——

Mr. Quinn: Strike that.

Q. (By Mr. Quinn): In your connection with the building and repairing of boats, did you find it necessary to be able to judge whether a boat was staunch and sound or not? A. Yes.

Q. In your opinion, upon completion of the work which you did, was the Tenyo Maru staunch and

(Testimony of Yoshinobu Matsumoto.)

sound? A. Yes, we have to in order to——

Mr. Collins: Your Honor, that question is very indefinite as to time. I don't believe—— [143]

The Court: 1945.

Mr. Collins: Well, he said after the work was completed.

Mr. Quinn: I meant immediately after. I am sorry.

The Court: Go ahead.

The Witness: Yes. We had to be able to make it seaworthy in order to let it get out of the shop. After all, the life of the fisherman depend on it.

Q. (By Mr. Quinn): Can you give me any idea of the extent of repairs which you performed in terms of the money that was charged for the job?

A. Well, I can't say off-hand how much it cost, but at that time I think it was—cost about four to five thousand dollars, somewhere around there, because we had it on dock for a little over a month, and work on it every day.

Q. In your capacity as a builder and repairer of boats, Mr. Matsumoto, have you had occasion to keep track of the market value of boats of this type as they are passed from buyer to buyer?

Mr. Collins: Your Honor, I object to that question. If this man is engaged as a carpenter, I don't believe he could be qualified as an expert on the market value of boats, unless he is shown to be actively engaging in that type of work. Carpentry would not call for that.

(Testimony of Yoshinobu Matsumoto.)

The Court: I think you have jumped a little bit afield. [144]

Mr. Quinn: If the Court please, I have asked him if, in his capacity as a boat builder and repairer, he found it necessary to keep informed of market values. Let the answer come first and then if Mr. Collins wants to challenge his expertness, even though he does keep track of them, we might have a question, but I see no objection to that question as asked.

The Court: He may answer this one.

The Witness: I can't say, because at that time I was just a carpenter working, but I can say, well, the market at that time on ships was quite high all around. They can't get material to build a boat.

Q. (By Mr. Quinn): I think you can stop right there. Your answer is you did or did not have an opportunity and find it necessary to keep track of the market of boats?

A. Well, I knew how much they selling at at that time, certain boat.

Mr. Collins: That has been answered, your Honor. I think if we struck the portion after he had stated that he had not, that would keep the record in a more satisfactory state.

The Court: Will you read his first answer.

(Answer read.)

Reporter: (Reading) "I can't say, because at that time I was just a carpenter working . . ."

(Testimony of Yoshinobu Matsumoto.)

Mr. Collins: My motion is to strike from that point [145] on.

The Court: Well, from that point on I would disregard it. I gather that his answer is in 1945 he was just a carpenter and didn't keep track.

Mr. Quinn: There was inference to that effect. I just wanted to get it "yes" or "no."

The Witness: Yes.

Mr. Quinn: His answer is, he means he did not know the market value of boats at that time.

The Witness: Not exactly that, but I mean I knew how much they were selling about in general was quite high. That is all I can tell you.

Q. (By Mr. Quinn): Since 1945, what have you been doing?

A. Well, I got in the Army, got discharged and started going back—because the family took over the shop again.

The Court: What kind of a discharge?

The Witness: Honorable discharge.

The Court: Say so. This is your opportunity to tell what kind you got. When you have occasion to mention your discharge, tell the world what kind of a discharge you got.

Q. (By Mr. Quinn): Have you done any boat building or repairing since that time?

A. Yes, since last year—no—February of 1947.

Q. How many boat shops in town, if you know, do any work on sampans? [146]

A. Well, there is Kewalo Ship Yard, Funai Boat



(Testimony of Yoshinobu Matsumoto.)

Shop, Hawaiian Tuna Packers, and my family shop, Ala Moana Boat Shop.

Q. What was the last?

A. Ala Moana Boat Shop.

Q. Mr. Matsumoto, do you know whether the sales of sampans are generally handled through brokers or in individual transfers from buyers to sellers?

A. So far that I know the owners and buyers, you know, prospective buyers, they transact everything, not through any brokers.

Q. Not using any brokers? A. Yes.

Q. Do the boat building shops ever sell sampans?

A. Yes, they do once in a while.

Q. Would you say if anybody were able to tell the market value of sampans that a boat builder could?

Mr. Collins: I object to that question, your Honor. It seems to be quite hypothetical.

Mr. Quinn: Well, I think it is addressed to his experience as a boat builder, if the Court please, and he is shown to be an experienced boat builder.

The Court: Well, you asked him, would you say thus and so? Thus he lifts himself by the boot straps and would be able to say.

Mr. Quinn: You mean it was a leading question? [147]

The Court: I think the question implies that he can lift himself up to the point where he can say.

Mr. Quinn: I think that is true, your Honor. I will reframe the question.

(Testimony of Yoshinobu Matsumoto.)

Q. (By Mr. Quinn): Is there anybody in the city——

Mr. Quinn: Strike that.

Q. (By Mr. Quinn): Is there any occupation that you know of in the city of Honolulu that would qualify a person to give an opinion on the market value of sampans better than a boat builder?

A. Well, I don't know, sir, that part. I think a boat builder more or less can tell whether the ship is seaworthy or not. They can check it and see whether it is poor or good. That depends on how much the owner wants to dump the ship on the market.

Q. Mr. Matsumoto, do you have an opinion as to the market value of the Tenyo Maru as of the date you completed work on the Tenyo Maru at the boat center?

Mr. Collins: Your Honor, I would object to that as being completely irrelevant. That work was completed some two years prior to this occurrence, and I fail to see what connection an evaluation as of that date would have as to its value at the time of the loss.

Mr. Quinn: If the Court please, I will grant that the value in 1945 is not conclusive as to the value in 1948, [148] but I suggest that the value in 1945 is some evidence as to what the value might be in 1948, assuming other factors are subsequently shown. I want to bring out right now whether the boat builder forms a value in 1945 at the time he is right

(Testimony of Yoshinobu Matsumoto.)

with the boat. I will then subsequently take this witness and see if he is familiar enough with the vessel, assuming that all conditions as to seaworthiness remain more or less constant, whether the value would go up or down in 1948. I will then subsequently attempt to show that the boat was kept in such repair that in 1948 it was worth—it is a fair inference to take the value in 1945, follow the market trend, and reach some value in 1948.

The Court: That would be permissible only if there was a definite showing that in April, 1948, there was no market for sampans of this sort, and even with respect to 1945, it isn't what the boat builder thinks, but it depends on whether or not in 1945 there was a market and what in his opinion this boat would have brought on the market, not its value to him as he looks at it as a boat builder.

Mr. Quinn: That is true. I asked him what he thought the market value was, because I believe it is established by his testimony that perhaps the boat builder knows more about market value—not what he thinks the intrinsic value is, but what he thinks it would bring if it were sold or could be sold.

The Court: I will allow him to answer that question [149] subject to a motion to strike. The answer will be subject to a showing that there was no market in 1948, in April.

Mr. Quinn: Very well, your Honor.

The Court: Do you understand the question?

The Witness: No.

(Testimony of Yoshinobu Matsumoto.)

The Court: In other words, when you were through repairing this Tenyo Maru in 1945—In what month?

The Witness: I just cannot tell the month. Let me think. It must have been around May.

The Court: Around May. What, in your opinion, if you have an opinion, was its fair market value at that time? Is that a fair statement of the question?

Mr. Quinn: Yes, your Honor.

The Witness: Well, I can't tell you how much it was really worth, but at that time there was quite a demand for boats, and material was pretty hard to get, and everything went zooming high in '45 and '46.

The Court: My rephrasing of Mr. Quinn's question is subject to your objection. You may have an exception to the Court's question.

Mr. Collins: May I have the answer?

(Answer read.)

Mr. Collins: No objection.

Q. (By Mr. Quinn): Was there a demand for boats in April, 1948? [150]

A. Well, people were still building boats.

Q. They were still building boats?

A. Yes.

Q. Showing you a copy of Libellant's Exhibit No. 1, which is the bill of sale for the Tenyo Maru, and which gives a description of the length and depth, and other characteristics, can you tell the

(Testimony of Yoshinobu Matsumoto.)

Court what it would take—how much such a boat would cost to build in 1948?

A. You mean just the hull or the complete——

Q. Complete new boat.

The Court: With engine?

The Witness: Engine equipment and everything?

The Court: Tackle.

The Witness: Gears. Well, as far as I know, in 1948 about a 48-foot sampan usually runs up about fourteen to sixteen thousand dollars. That is the hull alone. Other than that you have to get engine and gears. That part you have to get from hardware stores.

Mr. Collins: We can't hear very well down here, your Honor. I wonder if you will instruct the witness to speak a little louder. May we have the question read?

The Court: Yes.

Mr. Collins: I mean, may we have the answer read?

(Answer read.)

Q. (By Mr. Quinn): Are you familiar with market conditions [151] of sampans of that type in the year 1948? A. Well, I don't know.

Q. I can't hear you.

A. I said I don't know in 1948, because I was not in touch. I was out of the line already.

Mr. Quinn: No further questions.

The Court: Cross-examination?

(Testimony of Yoshinobu Matsumoto.)

Mr. Collins: I move that all of the testimony concerning the value be stricken, your Honor.

The Court: What is that? I haven't heard any.

Mr. Collins: The testimony with respect to the value of the hull and new hull in 1948.

The Court: Well, I haven't accepted that because he was asked for the market value and he was giving us the value of parts.

Mr. Quinn: If the Court please, I asked him at that time replacement costs.

The Court: Yes, complete.

Mr. Quinn: In other words, what would it cost to give you a complete sampan. He was unable to do so, but he said the hull would cost fourteen to sixteen thousand dollars, and then, in addition, you have the hardware, which would cost so much more. I think that that ought not be stricken. That is perfectly relevant, the cost as of the date of this accident.

The Court: Well, maybe I haven't paid much attention [152] to it because it was not a complete answer to your question. Do you want it stricken?

Mr. Collins: Yes, your Honor, I do. I believe the condition under which the evidence was submitted originally was the establishment of the fact that there was no fair market value as of the time of the accident.

The Court: Well, that is the objection I expected you to make when he asked for reproduction costs, but I didn't hear it.



(Testimony of Yoshinobu Matsumoto.)

Mr. Collins: I was waiting for his testimony to be completed and then ask that everything be stricken because he has testified he was not familiar with the market. But presumably there was a market at that time.

The Court: Well, I am going to let it stay in for such as it is worth. Frankly, I haven't even written it down, but I will do it now. Have you any questions of this witness?

### Cross-Examination

By Mr. Collins:

Q. Had you any contacts with the Tenyo Maru after it left the shipyard in 1945?

A. Well, after we launch it, well, we had to calk it for some slight leak; we had to re-calk it again.

Q. When was the last time?

A. They had shake-down crews, and when it comes back, they tell us where it was leaking, and check it. [153]

Q. That was in 1945, too?           A. Yes.

Q. You haven't done any work since 1945?

A. No, I haven't done any work.

Q. You have had no occasion to go over the ship?

A. No.

Mr. Collins: That is all.

Mr. Quinn: No further questions.

The Court: You are excused. Next witness.

(Witness excused.)

Mr. Quinn: If the Court please, if Mr. Collins will permit me, I would like to call Mr. Cho again for a couple of matters.

Mr. Collins: No objection, your Honor.

The Court: All right, Mr. Cho.

### JOHN Y. K. CHO

recalled as a witness on behalf of the Libellant, having been previously duly sworn, was examined and testified further as follows:

The Court: I remind you that you are still under oath.

### Redirect Examination

By Mr. Quinn:

Q. On what date did you acquire the Tenyo Maru, Mr. Cho? [154]

A. It was in August, 1945—'46, excuse me.

Q. 1946. I believe you testified that from that time until the loss of the ship, you were sending it out on fishing trips once or twice a month.

A. Yes, sir.

Q. Can you tell the Court what sort of repairs and upkeep the Tenyo Maru was given during that time?

A. Well, I have to take it to Tuna Packers and have the bottom repainted; sometimes have to repairs on the bottom, like that, like fish holes and things like that. I have them paint all that, and sometimes the sponson, have them fix the sponson, but it is always necessary to send the boat up be-

(Testimony of John Y. K. Cho.)

tween three to five months, you see, and up once dry dock.

Q. Did you send it up regularly every three to five months from the time you got it until the time it was lost?      A. Yes, sir.

Q. As a general practice, when you would put the boat in the custody of Tuna Packers, what instructions would you give Tuna Packers with respect to the repairs?

A. They would take the boat up; then whatever damages there were, if there were any, more or less the guy on the yard, Moore, they told him, he does all the figuring and what kind of repairs that is necessary. If there is any that he miss, we can tell him what it is and he will do it for us, or if he find anything wrong with it with his own eyes, he will tell us [155] that it has to be repaired and he does it.

Mr. Quinn: I believe that is all.

#### Recross-Examination

By Mr. Collins:

Q. Do you know how old the 'Tenyo Maru is, or when it was built?

A. The Tenyo was built in 1921.

Mr. Collins: No further questions.

The Court: You are excused.

(Witness excused.)

Mr. Quinn: If the Court please, I am going to

have to beg the Court's indulgence. I issued a subpoena the other day for a person whom I considered to be qualified to speak on the market value of this vessel, and it was only this morning at 8:30 that the Marshal advised me—of course, I think I might have gotten it into his hands fairly late—that he had gone to Hawaii between the time the praecipe was issued from our office and the time the Marshal was able to get there to serve him. Therefore, I would like to beg leave—since it is the hour—to put on the evidence of value at the next session, if there is to be such, and I presume there will have to be.

The Court: Other than that you are through?

Mr. Quinn: Other than that, I believe I am finished.

The Court: Who was this person?

Mr. Quinn: This was A. G. Funai, of the Funai Boat [156] Shop, who was the builder of this boat.

In the meantime, during noon—I don't know when Mr. Funai will be back, but during noon I checked around at some length, and we have found someone who I believe is qualified to testify, but he stated that he wanted some time to investigate the qualities of the vessel.

The Court: I don't know why this should be so difficult. Here some months ago we had a Chinese Junk, and we couldn't find anybody around here to testify as to its market value, but I thought when we came to sampans, they are bought and sold with sufficient regularity that you shouldn't have much difficulty.

Mr. Quinn: They are not bought and sold through experts, your Honor. That is the trouble. It is from customer to customer, or friend to friend, and one person to another, and whatever bargain he makes, that is the price for that boat, and it has no bearing on the next one.

The Court: Tuna Packers ought to have experts down there, hadn't they?

Mr. Quinn: We went to see them and we weren't able to get any expert opinion on the matter.

The Court: They come in here when some boat doesn't pay its bill.

Mr. Quinn: At any rate, your Honor, I believe I can produce evidence in the next hearing, but I would like to stop [157] for today.

The Court: Yes, we have been laboring rather diligently for the past hour. Tomorrow morning at 9 will you be ready?

Mr. Quinn: I certainly will scramble and try to be, your Honor, and I think I probably can.

Mr. Collins: I might say, your Honor, if it will help matters at all, the Libellee will be happy to go on the first thing in the morning, if Mr. Quinn's witness is not available.

Mr. Quinn: That is what I was hoping would be the situation, because I think the case, besides the evidence on value, for the Libellant is in.

The Court: All right. Tomorrow morning at 9.

(Thereupon, at 3:55 p.m., the hearing in the above entitled matter was adjourned to 9 a.m. the following morning, April 26, 1949.) [158]

April 26, 1949

The Clerk: Admiralty No. 409, John Cho vs. The Tug "Kolo" for further trial.

The Court: Are the parties ready?

Mr. Quinn: Ready for the Libellant.

Mr. Collins: Ready.

The Court: Mr. Quinn, are you going to be able to proceed this morning?

Mr. Quinn: I am, your Honor.

Call Mr. Leary.

### ROBERT T. LEARY

called as a witness on behalf of the Libellant, being first duly sworn, was examined and testified as follows:

The Court: Will you state your name, residence, age, occupation, and citizenship.

The Witness: Robert T. Leary; 29 years of age; residence, Honolulu; occupation, Coast Guard officer.

The Court: And you are a citizen of the United States?

The Witness: Citizen of the United States.

The Court: Exclusively?

The Witness: Yes, sir.

The Court: Take the witness.



(Testimony of Robert T. Leary.)

Direct Examination

By Mr. Quinn: [159]

Q. Mr. Leary, do you have any other occupation besides that of Coast Guard officer?

A. Yes, I am also vice president and general manager of Child's Marine, Ltd.

Q. What is Child's Marine, Ltd.?

A. Child's Marine, Ltd., is a yacht marine brokerage firm, sells marine insurance, does marine surveying.

Q. For how long have you been with Child's Marine?

A. I have been with Child's Marine since March of 1946. I am a reserve officer, and they called me back on active duty at this time. That's why I am Coast Guard.

Q. Did you have any experience with boats before March, 1946 in any capacity?

A. Yes, my experience with boats started in about 1934.

Q. Was that as a boat operator?

A. Boat operator on small boats. I was mate on a sailing ship around the World, and as skipper of Naval vessels, and so on.

Q. Are you actively engaged in the surveying, which you said that Child's Marine, Ltd. does?

A. Yes, I do practically all of the surveying, or at least check them out and sign them all before they go out.

Q. What do you mean by a "survey"?

(Testimony of Robert T. Leary.)

A. Those are surveys for marine insurance, appraisals for the banks, discount corporation, and special surveys if [160] people just want valuation on their vessels, want to know whether they are worth while fixing up, etc.

Q. Have you also had experience in the buying and selling of boats?

A. Our experience in the buying and selling of boats is purely from the brokerage standpoint. We do not buy and sell ourselves.

Q. You represent either the buyer or seller, or both, in transactions? A. Or both, yes.

Q. In connection with your position with Child's Marine, have you found it necessary to keep familiar with the market value of boats, as time goes on?

A. That is our primary job is to know market values and be able to advise both purchasers and sellers and to advise the banks and insurance companies.

Q. In that connection have you had occasion to remain familiar with the market values of sampans in the Honolulu area?

A. I have followed that quite closely.

Mr. Quinn: May I have the exhibit, please.

(Document handed to Counsel.)

Q. (By Mr. Quinn): Mr. Leary, I hand you Libellant's Exhibit No. 1, which is a bill of sale of a vessel known as the Tenyo Maru, and which is

(Testimony of Robert T. Leary.)

on a Bureau of Customs form, with [161] which I think you are familiar, which gives a description of a sampan.

Have you read the description, Mr. Leary?

A. Yes.

Q. Now, Mr. Leary, if a sampan of that type, such as described in Exhibit 1, were given a major overhaul in 1945, so that its deckhouse was repaired and a considerable number of ribs and planking were replaced, with a total repair cost of from four to five thousand dollars, can you give us your opinion of the market value of that vessel in April, 1948?

Mr. Collins: If your Honor please, I object to that question. If this is an attempt to evaluate the sampan in question as of the date of the accident, a consideration would have to be given to its condition as of that date, and not merely its theoretical age, or the work that had been done two or three years previous thereto.

Mr. Quinn: I believe, if the Court please, I left out an essential element in that question. I think Mr. Collins is calling my attention to it.

Q. (By Mr. Quinn): And, Mr. Leary, keeping in mind the factors I have just given you, and adding to them the fact that from August, 1946 until April, 1948 the sampan was placed in dry dock every three to five months, and when it was in dry dock such repairs as were found to be necessary

(Testimony of Robert T. Leary.)

were accomplished, with that added fact I ask your opinion of the value [162] of the vessel in April, 1948.

Mr. Collins: If your Honor please, I must again object. We are attempting to evaluate a vessel that has been on the reef for a period of days, and I submit that a question which does not take that into consideration does not evaluate the one in question.

Mr. Quinn: If the Court please, I think Counsel is being a little picayunish at this point. We are entitled to have the market value of the vessel not damaged as of April, 1948, from which can then be taken the value of such damage as was done on the reef.

The Court: Well, so long as it is distinctly labeled the "before value," as indicating its market value before the accident which occurred by the vessel's going on the reef; then later describing what happened to it and the "after value," so we can then find out what the value was as of the time it was cut loose.

Mr. Quinn: Yes, your Honor. I believe, however, that I am entitled to the market value of a vessel as a going vessel, less the cost of repairs, not the market value of a vessel which needs repair. I think there is a difference.

The Court: Well, we can get to it that way, but actually the thing we are interested in is the market value of the vessel at the time it was cut from the tow; what was the value of the thing that was lost at the time it was lost. [163]

(Testimony of Robert T. Leary.)

Mr. Quinn: Well, that is correct.

The Court: Maybe you can get at it by finding out the "before value," plus the other features, with the understanding that you are going to follow it up.

Mr. Quinn: Yes, your Honor.

The Court: I will allow this. Do you have the question in mind?

The Witness: No.

The Court: Would you like it read to you?

The Witness: I assume I am to appraise the vessel built in 1921, generally rebuilt in 1945, and I assume that she was never—she wasn't one of those sunk at Kapalama Basin or allowed to deteriorate.

The Court: You mean those the Military Governor took?

The Witness: Yes.

The Court: Was she one of those?

Mr. Quinn: It was not. And as far as the evidence is, it was rebuilt in 1945 and every four or five months put in dry dock.

The Witness: She was in fishing operation, I take it, normal operating condition?

Mr. Quinn: Yes. The evidence is that she was used approximately twice a month for fishing voyages that might last as long as fifteen days. [164]

The Court: That goes into the question?

Mr. Quinn: Yes, if the Court please.

(Testimony of Robert T. Leary.)

The Witness: You don't wish me to take in consideration any damage; I take it she was ready to go to sea.

The Court: We want from you now the facts that were given you in that question; namely, the value of any vessel such as was described before it met with any accident which brought about this suit.

The Witness: My valuation on that—being unable, of course, to see the vessel—I don't remember from having seen it at any time—would be between eight and nine thousand dollars. I think that is as of April, 1948. That would not be a present day valuation. I think that I would be unable to pin it down much closer than that through the variable factors.

The Court: I noticed in the question, and I think of it now, that nothing was said as to the kind of a motor the vessel had.

The Witness: That is in the——

The Court: Oh, it is in Exhibit No. 1?

Mr. Quinn: Yes.

The Witness: It is in here.

Mr. Quinn: That gave the dimensions of the vessel and the type of power.

The Court: So your "before value" is between eight and nine thousand dollars in April, 1948?

The Witness: In April, 1948.

Q. (By Mr. Quinn): Mr. Leary, are you familiar with the cost of repairs to vessels? Have you



(Testimony of Robert T. Leary.)

had occasion to determine how much damage has been done to a particular vessel in connection with your survey work?

A. Our survey work does not take that—in other words, we don't act as adjusters as a rule. The insurance companies usually get their own adjusters who go around and get estimates. I really could not qualify as an expert on marine adjusting.

Q. In connection with your work with Child's Marine have you had occasion to act as agent for boat owners who sought to have repairs made to their vessels? A. Yes, we have.

Q. And in connection with that experience, have you been familiar with the charges made by boat repair people for particular types of work which they do? A. Well, a limited degree, yes.

Q. How limited?

A. Well, our occasions to have a boat repaired for an owner, I would say, not more than several a year at the most.

Q. Well, in boats that is fairly many, isn't it, Mr. Leary?

A. Well, it keeps us somewhat in touch. We are not completely ignorant. The new boat costs we follow quite closely; the repair costs, follow that somewhat. [166]

Q. Now, Mr. Leary, if the sampan, the characteristics of which you have just examined, had been on the reef for two or three days, as a result of which it had received a battering on the port side

(Testimony of Robert T. Leary.)

in about the middle, below the water line, resulting in a leaking in an area of about a foot and a half long, through which the water was coming in sufficient amount that pumps were required to keep up with the amount of water coming in, can you give us an opinion as to the cost of making repairs of the planking necessary to make the vessel seaworthy again?

A. It would depend how large an area was actually chewed or splintered.

Q. I believe the evidence is that it was about a foot and a half long.

A. Over how wide a section?

Q. Three or four inches wide.

A. I take it that was on one strait, or did it go to several straits; on one plank or several?

Q. Well, it was testified that it went more or less horizontal. I presume that you should, for purposes of this opinion, take the maximum planking consistent with a horizontal type of abrasion.

A. Was there any damage to frames or to the keel?

Q. None testified to.

A. And I take it that the vessel had excessive water in [167] it; or was machinery damaged? Does that have to be taken into account, or just the hull?

Q. Just the hull is all the damage that is shown, Mr. Leary.

A. I would estimate, quite rough—I take it that

(Testimony of Robert T. Leary.)

this vessel would be hauled to Tuna Packers or a similar yard.

Q. Or a similar yard, yes, that is correct.

A. I would estimate that the entire job would probably run around six hundred, six hundred fifty dollars, if it is as I picture it.

Q. In your experience, Mr. Leary, would you say that a vessel which had such a wound in its hull and which was taking water so that pumps were required was a seaworthy vessel?

A. I think that would depend entirely on the degree to which she was taking water. The vessel would remain seaworthy up until the point where you could no longer handle it with the pumps and her stability was partially destroyed. If you could keep the bilge dry with the pumps and the pumps were properly working and continued to work, she would remain seaworthy, provided she was not structurally weakened so that she twisted and strained other sections.

Q. Mr. Leary, would the characteristics of a vessel with such a wound in her hull——

Mr. Quinn: Strike that, please.

Q. (By Mr. Quinn): Would it be anticipated that such [168] an area in the hull might allow more water in in rough water than it would in a protected harbor?

A. That is very possible. There are several kinds of damage where the action of the rolling of the vessel might allow more water in due to the pres-

(Testimony of Robert T. Leary.)

sure of the vessel rolling around and squirting in, where otherwise it would come in under less pressure.

Q. Are you quite familiar with the operating characteristics of a vessel such as a sampan?

A. Yes.

Q. In your opinion, will a sampan, with its decks awash, with the water up to the cabin, and with about three or four feet freeboard in the bow, sink, assuming that the fuel tanks are about half full and that there is no load?

A. All compartments flooded?

Q. All compartments flooded.

A. To the best of my knowledge and from the experiences that we have had with sampans flooded, they do not normally sink. They will remain awash.

Q. Now, is that true irrespective of wind and sea conditions?

A. That is correct, because it is considering it as a submerged object, and there is practically nothing showing; the waves can wash over and she may submerge a bit, but she would normally rise again until she was awash in the troughs. [169]

Mr. Quinn: No further questions.

#### Cross-Examination

By Mr. Collins:

Q. Mr. Leary, if a sampan has been sitting on a reef for two or three days, is it possible to determine the damage that has occurred to that except

(Testimony of Robert T. Leary.)

by making a thorough inspection of the hull inside and outside?

A. I would say that you would have to make a fairly thorough inspection to tell just where the damage might lie.

Q. It is possible, in other words, if a sampan was sitting on a reef, that some of the framing might be fractured, although not observable from the main deck; is that correct?

A. It would not be observable from the main deck. Most sections of the vessel, or a good portion, you could observe it from the interior.

Q. And, similarly, there might be weakening of the planking that could not be determined until tests were made on it; is that correct?

A. There might be, yes.

Q. Then your estimate of six hundred to six hundred fifty dollars as the repair bill for damage of a fracture of about a foot and a half by about three or four inches is based purely upon an injury of that nature confined to that area, presuming that the rest of the hull is in good condition?

A. That is correct. No split frames or damage to sea [170] connections or other damage than just to the planking, figuring the length that you would have to carry out in order to safely put in a piece of plank.

Q. And if the engine or the motor of this sampan was completely inundated, would that increase the repair bill?

(Testimony of Robert T. Leary.)

A. It would increase it appreciably, yes.

Q. And you say if a sampan was taking in water, that it is rather difficult to determine whether it is seaworthy or not seaworthy without having inspected the ship and seeing the actual condition that it was in?

A. That is correct. You can tell, as a rule, where the vessel is taking in water. It would depend how thoroughly it was inspected from the inside.

Q. As a practical seaman, you would hesitate to give the opinion of the seaworthy character of a vessel if you had not observed it yourself?

A. Yes, sir, it would be very hard to say without actually seeing it. I have to use somebody else's description.

Q. Yes. Did I understand you to say, in effect, that you do not know of any sampans that have sunk in these waters?

The Court: He didn't say that.

The Witness: Not in so many words.

Q. (By Mr. Collins): When you expressed the opinion that sampans do not normally sink, is that based upon an experience or lack of knowledge of any sampan sinking? [171]

A. That is based upon the experience of several sampans which have become totally flooded and have not sunk.

Q. Do you know of any sampans that have sunk?

A. I don't know of any sampans that we are



(Testimony of Robert T. Leary.)

sure have sunk. Some of them are reported to have sunk, but the term is used generally—most people will consider when a vessel is flooded that she is sunk. That word is used. There is only one case that I am particularly familiar with where a vessel was reported sunk, and we are sure that she completely submerged; we know she flooded and filled.

Q. Well, would you be willing to express an opinion to the effect that a sampan could not sink?

A. I would be willing to express an opinion that from the experience I have had around here with sampans and following their losses and what not, that they do not appear to sink. That is the best knowledge that we have. They do not normally sink when flooded.

Q. But you wouldn't throw out the possibility of their sinking?

A. That would be—there could be, possibly, conditions under which a sampan might go right on down. There is definitely a problem there of ballast and buoyancy material—buoyant material in the hull; there would be a point at which she would go down; if a heavy enough engine were put in a boat, why, no amount of wood would keep it afloat. That is not [172] normally the case with our Hawaiian sampans, however.

Q. In your estimated figure of six hundred to six hundred fifty dollars for the repair of the planking that was described to you, that would, of

(Testimony of Robert T. Leary.)

course, not include any items of repairs that might occur to other parts of the ship than the hull itself?

A. I am figuring in that the pulling her up on the wharfs, replacing that section of planking damaged, which in this case is quite small, recalking, cementing the seams, and painting that section, and putting her back in the water. It does not include paint job or any other item than just repairing that section and putting her back, if she were not damaged anywhere else.

Mr. Collins: That is all.

Mr. Quinn: I have no further questions.

The Court: All right, you are excused.

(Witness excused.)

Mr. Quinn: That is the case for the Libellant, your Honor.

The Court: Very well. Does the Libellee wish to make an opening statement?

Mr. Collins: If your Honor please, the position of the Libellee in this matter is that the tow that was undertaken was undertaken completely without the authority of the owner of the tug; that beyond that it was known by the owner of the [173] sampan, the tow, that the tow was being undertaken without the authority of the owner; that any condition with respect to the seaworthiness or unseaworthiness of the tow was equally known by both the tug master and the owner of the tow.

We contend, therefore, that there is no liability, because the acts done by the captain of the tug were beyond his authority, were known to be such; likewise, that if it should be found that such is not the fact, the condition of the vessel being what it was, the accident that occurred was a result, not of the negligence of the tug master, nor of the crew of the tug, but was rather due to the negligence of the owner of the vessel in improperly manning and in improperly equipping it, and permitting it to go out in the condition that it was in.

The Court: Call the first witness.

Mr. Collins: Mr. O'Neill, please.

### RICHARD O'NEILL

called as a witness on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

The Court: Please state your name, age, residence, occupation, and citizenship.

The Witness: Richard O'Neill, 412028 Mohala Way, Honolulu, T. H.; employed by Young Brothers, Ltd., 221, as dispatcher.

The Court: You are a citizen of the United States?

The Witness: Citizen of the United States, sir.

The Court: Exclusively?

The Witness: Exclusively.

(Testimony of Richard O'Neill.)

Direct Examination

By Mr. Collins:

Q. What was your position or occupation on or about April 4, 1948?

A. Relief to the port captain at Young Brothers, Captain William Pavao.

Q. Were you on duty on that day?

A. On Sunday, April 4, yes, sir.

Q. Did any event occur on that day in connection with the Tenyo Maru?

A. I had a telephone call while on duty at around 4 o'clock by a lady stating that there was a sampan on the reef in Molokai; and I told them there was nothing to be done at that time. But they were coming down.

Later, Mr. Cho, and whom I found out later the lady was his sister, came down and asked in regard to the Tenyo Maru. I immediately called Mr. Harrison, because any salvage jobs or any outside tows are under the jurisdiction of the head of the organization, sir.

I asked Mr. Cho and his sister at the time approximately where. They did not know definitely too much information on it at the time, sir. I spoke to Mr. Harrison, and Mr. Cho spoke to Mr. Harrison by 'phone. [175]

After that conversation, Mr. Harrison called for me back on the 'phone, at which time I told them there would be nothing dispatched from Honolulu that day, sir.

Q. Who was present in the office at that time?

(Testimony of Richard O'Neill.)

A. I was in the office at the time when Mr. Cho and his sister came in, sir.

Q. Was anybody else there?

A. Not that I recall, sir.

Q. During the entire conference, no one else was present other than the people which you have mentioned?

A. If—after I had completed the conversation, they were beginning to leave, sir, we had one launch operator on duty came in, sir, to make out his log, sir.

Q. Who was that?           A. Joe Kahiapo.

Q. Was he present during any of the conversation?           A. Not to my knowledge, no, sir.

Q. Have you any recollection of Mr. Kahiapo's making any statements at all there at that time?

A. No, sir, not pertaining to the sampan at all, sir. He was making his logs and ready to leave, sir.

Q. Did you have any further conversation with Mr. Cho or his sister, other than what you have related?

A. No, sir, I did not, sir. It was left entirely up to anything to be done would have to be decided the following [176] morning, sir.

Q. Did you give any instructions to Mr. Kahiapo in their presence?           A. No, sir, I did not.

Q. Did you give any instructions to Mr. Kahiapo?           A. No, sir, I did not.

(Testimony of Richard O'Neill.)

Q. Did you have any further contact at any time with Mr. Cho?      A. No, sir.

Q. Or with his sister?      A. No, sir.

Mr. Collins: That is all.

The Court: Cross-examination?

### Cross-Examination

By Mr. Quinn:

Q. In other words, you didn't know what arrangements were being made with respect to the sampan off Molokai?

A. No, sir, I did not have the final "yes" as to any disposition of it at all.

Q. I didn't ask you that, Mr. O'Neill. Did you know what arrangements were being made?

A. There were no arrangements made at that time, sir.

Q. Did Mr. Cho ever come back to Young Brothers, to your knowledge?

A. He did not speak to me if he did, sir. [177]

Q. Do you know whether or not the following day, as a result of the visit of Mr. Cho and his sister a tug was sent up to Kaunakakai?

A. I was not on duty in the morning, sir. I came on duty after 12 o'clock that day, sir.

Q. So you don't know whether any tug went up to Kaunakakai the next morning?

A. The only tug I would know anything about was the pineapple tug that I knew was scheduled to go up, sir.



(Testimony of Richard O'Neill.)

Q. And where was that scheduled to go?

A. To Kaunakakai.

Q. That is where they took a pineapple barge out, is it?

A. Yes, sir, Island of Molokai.

Q. Isn't that at the harbor of Kolo?

A. There is one goes into Kolo, one into Kaunakakai, sir.

Q. Did you have a usual routine of sending one to Kaunakakai every Monday morning?

A. The large tug went to Kaunakakai, yes, sir.

Q. But as far as you know, there were no arrangements made at any time for either of these pineapple tugs to see this sampan on the reef?

A. I had—I know of no knowledge to that effect, sir.

Q. You have no knowledge to that effect? [178]

A. No, sir.

Q. And when you talked to Mr. Harrison, what was the substance of your conversation on the telephone?

A. Merely stating that there were people there at that time that had a tug in distress, sir, and asking whether or not we would dispatch any assistance or anything to them at all, sir. And the question came up—Mr. Harrison asked me about the Coast Guard. And I found out from the owner that the Coast Guard had looked, and due to no danger of life aboard, there was nothing they could do.

(Testimony of Richard O'Neill.)

Q. What did Mr. Harrison say?

A. He said if anything at all would be done, they would talk it over tomorrow morning, sir, at which time I was not on at the boat house.

Q. In other words, you did not talk it over with Mr. Harrison?

A. I did not speak to Mr. Harrison, no, sir.

Q. Did you have any conversations with Mr. Harrison at all with respect to this salvage job?

A. No, sir.

Q. What were your duties as relief to the port captain?

A. Assistant to the port captain and relieve him in long hours' duty during the day, sir.

Q. Do you keep track of the location of your tugs at all times? [179]

A. Yes, sir, there is a log. We check the logs each day when they return, yes, sir.

Q. You know where they are going before they go, don't you?

A. The port captain does, yes, sir.

Q. But the assistant port captain doesn't?

A. Well, you check the logs after the boats have left, yes, sir.

Q. Were you on any long hours Monday?

A. Monday, no, sir. I was not on exceptionally long. I came down approximately 12 o'clock. I don't recall the exact hour I left the boat house.

Q. Did you check the log?

(Testimony of Richard O'Neill.)

A. The boat had not returned, sir. His log wasn't in.

Q. You had no information as to records where the boats were going?

A. Only from the dispatch slips, sir.

Q. When do your boats get back from pineapple trips?

A. All depends on when they finish picking, sir.

Q. When they finish what?

A. Picking pineapple.

Q. Picking pineapple?                      A. Yes, sir.

Q. They go on Monday and wait until the pineapples are picked, and it might be Tuesday or Wednesday before they get [180] a barge?

A. Usually their barge is there one day, sir. When I said all depends on time of arrival would be the time of departure from Molokai, sir.

Q. Is it not true that there was a usual routine for a set day for a tug to go to each of these harbors?

A. Depends on whether the cannery here is running, sir. The pineapple season varies; at times they pick every day; at different times it is once a week, maybe.

Q. Isn't it true that there was a usual routine of sending tugs up on a particular day of the week to each of those harbors?

A. If designated they were picking pineapple in that port that day, yes, sir.

(Testimony of Richard O'Neill.)

Q. But there was not a set day every week?

A. No, sir, there is definitely not a set day in the pineapple season, sir.

Q. So, when did you receive word that these tugs were supposed to go up to the pineapple barges on Monday?

A. They were scheduled to leave Monday evening.

Q. They were scheduled to leave Monday morning; and that schedule was prepared when?

A. Beg pardon?

Q. That schedule was prepared when?

A. Friday or Saturday of the week before. [181]

The Court: Excuse me. He said Monday evening and you said Monday morning.

Mr. Quinn: Excuse me.

The Court: If it makes any difference.

Q. (By Mr. Quinn): What time did you get on duty Monday? A. Twelve o'clock.

Q. Noon? A. Yes, sir; 12 noon.

Q. And the pineapple tugs, I take it, were just ready to go up to their respective harbors?

A. The Tug Mahoe was ready to take a tow out that afternoon, yes, sir.

Q. Where was the Tug Kolo?

A. The Tug Kolo had been sent to Molokai, sir, according to the dispatch sheet.

Q. According to what? A. Dispatch sheet.

Q. For a pineapple barge job?

A. Yes, sir.

(Testimony of Richard O'Neill.)

Q. In Molokai? A. Yes, sir.

Q. Kaunakakai?

A. That I couldn't say definitely.

Q. You don't know where it was on Molokai, what Harbor, Kolo or Kaunakakai? [182]

A. I beg your pardon?

Q. Where is Kolo?

A. Kolo is approximately ten miles Honolulu side of the harbor of Kaunakakai.

Q. On Molokai?

A. On the island of Molokai, yes, sir.

Q. Was that unusual that the Tug Kolo should leave in the morning and the Mahoe in the evening?

A. No, sir, it is not particularly unusual.

Q. It is not particularly unusual?

A. No, sir.

Q. Wasn't it a departure from the schedule that you just outlined, that they usually left Monday evening?

A. I said the large pineapple tug left in the evening, sir, the big tug to tow the barge.

Q. What does the Tug Kolo do with respect to pineapple barges?

A. The Kolo relieves the large tug off shore at Kolo Harbor, because the large tug has too deep a draft to proceed into the small harbor at Kolo.

Q. So the two tugs work together?

A. Right.

Q. And the Kolo has nothing to do with any

(Testimony of Richard O'Neill.)

pineapple barges except in connection with the Mahoe?

A. Oh whichever large tug it might be. [183]

Q. Were there any other large pineapple tugs with which the Kolo was supposed to work when it went up there Monday morning?

A. That particular week, not to my knowledge, no.

Q. As a matter of general practice, when you send your pineapple tug, whichever one it may be, together with the small tug, to assist the barge, don't they travel more or less together?

A. It has been the practice at times, sir, but at that time it was deemed that the operators preferred to travel during the day on a small tug rather than in the evening, sir.

Q. It was deemed——

A. Advisable, for a matter of sleep and everything else.

Q. So, as far as you know, the Tug Kolo was ordered out to Molokai the morning of Monday morning, the fifth day of April, to await the arrival of the Mahoe the following morning?

A. Yes.

Q. Now, who talked to Mr. Harrison on the 'phone last, you or Mr. Cho?

A. Me.

Q. And at that time you say that Mr. Harrison said that if any arrangements were to be made, he would make them?

A. Correct.

The Court: Excuse me. Let me get this straight. First, you called Mr. Harrison, and during that con-



(Testimony of Richard O'Neill.)

versation [184] Mr. Cho talked to Mr. Harrison, as I understand it.

The Witness: Correct, your Honor.

The Court: Then that conversation terminated; 'phones were hung up; and as I understand——

The Witness: No, sir.

The Court: (Continuing) ——Mr. Harrison called you back.

The Witness: No, sir, the 'phone was just passed back to me, the same connection, sir. The connection was not broken.

Q. (By Mr. Quinn): So when Mr. Cho left your office, he was still looking for somebody who might help him with respect to his sampan, as far as you knew?

A. So far as I know, right, sir.

Q. Did he ask your opinion as to what he might do to get some help?

A. He asked if we could take it, and I told him I did not know definitely. I would imagine at that time—as I say, I imagine some representative of our organization would have to see the vessel or anything before we would take hold of it, sir, due to the fact that, as the Coast Guard had stated, there was no danger of loss of life aboard.

Q. Is that the standard under which you take tows?

A. Well, we don't take a tow unless someone responsible inspects it, sir. [185]

Q. I didn't ask you that. You said that——

(Testimony of Richard O'Neill.)

Mr. Quinn: Strike that, please.

I have no further questions.

The Court: Redirect?

Mr. Collins: No redirect.

The Court: You are excused.

(Witness excused.)

The Court: Next witness. We might save time by taking our 10 o'clock recess now. You can have your next witness ready.

(Recess had.)

The Court: I believe we are ready for the next witness.

### EDWARD T. HARRISON

called as a witness on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

The Court: Mr. Harrison, you have been sitting here long enough to know my identification formula.

The Witness: Edward T. Harrison, 5949 Kalaniana'ole Highway; vice president and general manager, Young Brothers, Ltd.; age 56; American citizen by birth.

The Court: Are you a citizen exclusively of the United States of America?

The Witness: Yes. [186]

(Testimony of Edward T. Harrison.)

Direct Examination

By Mr. Collins:

Q. What was your position with Young Brothers on or about April 4, 1948?

A. First vice president and general manager.

Q. On that date, April 4, 1948, are you familiar with any event that occurred? Did you have any conversations or communication in connection with the Tenyo Maru?

A. On April 4, about 4 o'clock, I was at home, and there was a telephone call from the boat house, from the assistant port captain, Richard O'Neill. He stated that there was a sampan on the reef in the channel at Kaunakakai, and that the owners were at the boat house and wanted assistance; that the Coast Guard tender had already been at the scene and refused to give any assistance because there were no lives aboard. He then turned the telephone over to a person whom I didn't know.

Q. Did that person identify himself or herself?

A. As the owner of the sampan.

Q. What conversation was had with the owner?

A. I couldn't understand—I told him we would be glad to help, but we weren't able to do it at that time, that we would look into the matter in the morning. But we didn't seem to understand each other very well, and I told him to turn the telephone back to O'Neill; and I gave him the same message, that we wouldn't do anything on Sunday

(Testimony of Edward T. Harrison.)

and not to dispatch any [187] boat, and I would be down in the morning and talk it over.

Q. Did you make any statement on that telephone call, either to Mr. O'Neill or the owner, indicating that Young Brothers would accept any salvage work in connection with the Tenyo Maru?

A. No.

Q. Did you have any further contact with the owner of the sampan on that day? A. No.

Q. Did you have any further contact with Mr. O'Neill on that day? A. No.

Q. Did you have any further conversations or communications with anyone in connection with that Tenyo Maru on that day?

A. No. I only told the family there was a sampan on the reef.

Q. On Monday, the fifth, did you have any conversation or communication with Joe Kahiapo in connection with the salvage work? A. I did.

Q. Will you state to the Court what the nature of that conversation was.

A. I had the port captain send Joe Kahiapo up to my office at 8 o'clock. He was the master of the Tug Kolo, and [188] would have been going to the port of Kolo on Monday to assist the pine barge into the harbor of Kolo on Tuesday morning.

I asked Joe Kahiapo to proceed to Kaunakakai and look over the situation, as far as the sampan was concerned, and if he could be of any assistance in taking it off the reef without injury to his own

(Testimony of Edward T. Harrison.)

vessel, he was to do so, take the sampan to the pier at Kaunakakai and secure it or beach it; but that he was to do nothing else.

Q. Did you have any further conversation with Mr. Kahiapo at that time?      A. No.

Q. Did you have any further conversation with Kahiapo prior to his return to Honolulu on Wednesday the seventh?      A. No.

Q. Calling your attention to Tuesday, April 6, did you have any discussion with any member of the staff of Young Brothers in connection with the Tenyo Maru?

A. Yes. We had a directors' meeting on Tuesday morning; and, as I came out of the directors' meeting about 11 o'clock, the port captain, Bill Pavao, said that Captain Ching Ho of the Tug Mahoe had telephoned down, and that the owner of the Tenyo Maru wanted to know how much we were going to charge to take the Tenyo Maru off the reef. I told him to tell him \$200.

He said that Captain Ching Ho had also told him that the [189] owner was very poor and probably would not have that much money. And I said, "Well, take it off and secure it, and we will settle about the money later."

Q. Was there any discussion with Mr. Pavao at that time concerning any towage to Honolulu?

A. No.

Q. Was there any discussion with anybody in your staff, prior to that time, concerning towage to Honolulu?      A. No.

(Testimony of Edward T. Harrison.)

Q. Did you have any discussion with the owner, or any representative of the owner, prior to that time, concerning towage to Honolulu?

A. No.

Q. When did you first learn that Kahiapo had taken this tow?

A. When he telephoned me Wednesday night about 9 p.m. at my home and told me that he had lost the tow in the channel.

Q. On Thursday the third did you have any discussion with the owner of the sampan concerning the Tenyo Maru?      A. Yes.

Mr. Quinn: Excuse me.

The Court: On what date?

Mr. Collins: This is Thursday.

Mr. Quinn: The third?

Mr. Collins: No, that is the eighth. [190]

Mr. Quinn: Thursday the eighth.

Q. (By Mr. Collins): Will you tell the Court what the nature of that conversation was.

A. Well, Cho and a man named North came to the office; the port captain brought them up to the office. And I asked the owner who had authorized the tow, and he said that Kahiapo had. He then showed me a bill of sale to the Tenyo Maru and I took down the details of its size and power and ownership, the date it was built.

And when Cho made the statement that Kahiapo had accepted the responsibility, North interrupted and said, "That isn't right. We don't——"



(Testimony of Edward T. Harrison.)

Mr. Quinn: I am going to object to any statement of Mr. North's. I would like to catch it before it comes in.

The Court: That would be hearsay.

Mr. Collins: Yes. Omit any reference to what Mr. North said.

The Court: You can tell us that he interrupted, but don't tell us what he said.

The Witness: He interrupted.

The Court: Go ahead.

The Witness: That is all.

Mr. Collins: If your Honor please, I would like to ask a question concerning what Mr. North did say, not for the purpose of the truth of the statement that he made, but for [191] the purpose of proving that he did make that statement and the reaction of the owner to that statement. I will ask the witness if he will tell the Court what was said by Mr. North.

Mr. Quinn: I will object to any such statement as pure, unadulterated hearsay. Mr. Collins can ask, and has asked, whether Mr. North—I think that is the name—made a statement, and he can then ask what the reaction of Mr. Cho was to the statement, but there is no necessity whatsoever for bringing in what Mr. North said.

The Court: You can, without having the witness give us that bit of hearsay, repeat that which he has told us; namely, that this Mr. North, at this time that he is talking about, interrupted Mr. Cho

(Testimony of Edward T. Harrison.)

and made a statement, and then you can ask him—pick it up there and ask him what Mr. Cho's reactions were to that statement.

Later, if somebody calls Mr. North and he denies having said anything on this occasion, perhaps that is a different situation, but you can get what you want without getting what North said.

Mr. Collins: If your Honor please, I thought I was permitted to ask a question, even though hearsay, as long as the truth of the statement was not at stake. The only thing we are interested in is establishing that a particular statement was made and certain reactions were had to it.

The Court: Yes, there are situations where hearsay [192] is permissible so long as it is not offered for the truth, as you say. But I don't see any great advantage in doing it when you can here get what you want without bringing into my mind that hearsay. Once I hear it it is hard to eliminate it, even though I am sure I would. I can't see why you would have to do that when what you are after is this man's reactions.

Mr. Collins: But the reactions without the statement are worthless.

Mr. Quinn: That may be, but the statement itself is still coming in as a hearsay statement in that case. Mr. Collins is quite right that you can prove a statement without offering it for the truth of the matter asserted. You can prove, as Mr. Morgan used it time and again: A person said, "I am the

(Testimony of Edward T. Harrison.)

Pope," and not prove he was the Pope, but to prove a statement that he might be unbalanced.

This doesn't prove anything but that Mr. North made a statement, and you have already proved that a certain Mr. North said such and such, which is what you want. It is hearsay without any features that would redeem it for the purposes of this examination. I can't cross-examine Mr. North on that.

Mr. Collins: It is not a question of cross-examining Mr. North. It is a question of cross-examining Mr. Harrison as to whether Mr. North said that. After all, that is the only thing that is of consequence, whether he did make the statement. As I said, we are not concerned at all whether it is [193] a true statement or a false statement.

The Court: At the moment I can't see any necessity of taking refuge in an exception to the hearsay rule. You state your question, and I will rule on it, but I am disposed to say now that unless I find a better reason for doing it, I am simply going to limit you to getting Mr. Cho's reactions to something that Mr. North may have said, without describing what Mr. North said.

Mr. Collins: My question was directed to the witness to ask him to state what Mr. North had said.

The Court: That is a question actually pending?

Mr. Collins: That is the last question pending.

The Court: Is that correct, Miss Reporter?

(Testimony of Edward T. Harrison.)

The Reporter: (Reading) "Q. Will you tell the Court what the nature of that conversation was?"

The Court: I think you were talking to me.

Q. (By Mr. Collins): Will you state to the Court what Mr. North said on that occasion.

Mr. Quinn: I object, if the Court please, on the ground that it is hearsay and not——

The Court: Sustained, and an exception——

Mr. Collins: The objection was sustained?

The Court: Yes.

Mr. Collins: May I have an exception?

The Court: Yes. [194]

Mr. Collins: And may I make an offer of proof at this time.

The Court: Yes.

Mr. Collins: I offer to prove that this witness would have testified that Mr. North had stated that he and Mr. Cho had taken the towage to Honolulu on their own responsibility.

The Court: Your offer is denied, and you have an exception to that denial, too.

Q. (By Mr. Collins): What was Mr. Cho's reaction to Mr. North's statement?

A. Cho said, "We don't want to get Joe Kahiapo in trouble. We don't want him to lose his job, and I guess you are right."

Q. Is Mr. Kahiapo still in the employ of Young Brothers? A. No.

Q. When was his employment terminated?

(Testimony of Edward T. Harrison.)

A. About two days after this occurrence.

Mr. Collins: That is all, your Honor.

The Court: After what occurrence? This conversation?

The Witness: After they came back in that Thursday.

The Court: Cross-examination?

### Cross-Examination

By Mr. Quinn:

Q. On Monday, the fifth of April, you told Kahiapo to go up there, take a look, and, if he could, tow the sampan off the reef; is that right? [195]

A. That's correct.

Q. Kahiapo was the master of the Kolo?

A. That's correct.

Mr. Quinn: No further questions.

The Court: You are excused.

(Witness excused.)

Mr. Collins: Mr. Ching Ho.

### CHING HO

called as a witness on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

The Clerk: Just sit down, please.

The Court: Please state your name, age——

The Witness: Ching Ho.

(Testimony of Ching Ho.)

The Court: How old are you?

The Witness: Thirty-six.

The Court: And you live here in Honolulu?

The Witness: Yes, sir.

The Court: And are you employed?

The Witness: Yes.

The Court: By?

The Witness: Young Brothers.

The Court: And are you a citizen of the United States?

The Witness: Yes, sir.

The Court: Exclusively, only?

The Witness: Yes, sir. [196]

The Court: Take the witness.

### Direct Examination

By Mr. Collins:

Q. What was your job on or about April 4, 1948?

A. I am captain on the Tug Mahoe.

The Court: This is the man we have been hearing about? He doesn't look like a tug boat captain.

Q. (By Mr. Collins): Did you on Monday, April 5, make a trip from Honolulu to Molokai in the Mahoe? A. Yes, I did.

Q. In connection with that sailing, did you receive any instructions? A. Yes, I did.

Q. From whom did you receive instructions?

A. Captain Pavao.

Q. And what was the nature of the instructions?



(Testimony of Ching Ho.)

A. To take my pineapple barge to Kolo and proceed to Kaunakakai.

The Court: Speak a little louder.

The Witness: And proceed to Kaunakakai to assist the Tenyo Maru off the reef.

The Court: I didn't quite get that. Did you say Captain Pavao gave you the order to assist the Tenyo Maru off the reef?

The Witness: To see if I can pull it off the reef, yes. [197]

The Court: With your tug?

The Witness: To see whether we can do it with my tug or otherwise get the Kolo to come up and pull it off.

Q. (By Mr. Collins): Did you receive any instructions with respect to the Tug Kolo in connection with that operation?

A. What was that again?

Q. Did you receive any instructions with respect to the Tug Kolo in connection with that operation?

A. I was not to pull it off; to go down to Kolo and take the Tug Kolo to Kaunakakai and pull it with the Kolo.

Q. So your instructions were to assist the Kolo to the extent necessary; is that correct?

A. Yes, sir.

Q. And did you proceed to Kaunakakai?

A. I did.

Q. And from there to Kolo? A. Yes.

Q. When did you arrive at Kolo?

(Testimony of Ching Ho.)

A. That morning, Monday morning.

Q. On which day?

A. April 5. I got off Kolo at 6:30.

Q. Suppose you start from the beginning and tell us just what your operation was from Honolulu.

A. From Honolulu I was supposed to take a pineapple [198] barge to Kolo. And the Tug Kolo is supposed to meet me off Kolo to take the pineapple barge into Kolo dock, and I was supposed to proceed from Kolo to Kaunakakai.

Q. Now, when you arrived at Kolo, the Tug Kolo was there?      A. It was.

Q. And she assisted the barge in?

A. Yes, it did.

Q. At that time did you have any conversation with the captain of the Kolo?

A. He just told me he can't pull the Tenyo Maru off the reef.

Q. Well, then what did you do?      A. What?

Q. Then what did you do?

A. Then I proceeded to Kaunakakai.

Q. What did you do on arrival at Kaunakakai?

A. On arrival at Kaunakakai I talked to Cho and Mr. North up there.

Q. About what time did you arrive at Kaunakakai?

A. About nine o'clock.

The Court: Excuse me.

Q. That was on Tuesday?

A. On Tuesday morning.

(Testimony of Ching Ho.)

The Court: What was that second name? You talked to Cho and whom? [199]

The Witness: Buster North.

Q. (By Mr. Collins): Will you tell us the substance of the conversation that you had with Mr. Cho.

A. That morning I got over I asked him if he had insurance on his sampan.

The Court: Wednesday morning?

The Witness: Tuesday morning.

Mr. Collins: That was Tuesday morning, your Honor.

Q. (By Mr. Collins): Did you have any further conversation?

A. He asked me for the price of towing the sampan off the reef. I told him I had to call back to Captain Pavao in Honolulu to find out the cost.

Mr. Collins: Would you speak up a bit louder, please. Do you want the last answer?

Mr. Quinn: Yes.

(Answer read.)

The Court: Speak louder so they can hear you. I am sure when you are on your tug you can shout. Go ahead and shout out here.

Q. (By Mr. Collins): And what happened as a result of this conversation?

A. Well, at 10 o'clock I called Captain Pavao up.

Q. And what was the substance of your conversation with Captain Pavao? [200]

(Testimony of Ching Ho.)

A. I told him Cho told me that he got no insurance on his sampan, and I want to find out what it cost to pull it off the reef. He told me——

Mr. Quinn: I will object, your Honor. I think Captain Pavao is here and able to testify as to what he said himself. There is no sense giving him a right to corroborate his hearsay statements as testified to by Mr. Ching Ho. I believe Captain Pavao's statements on the telephone at this point are pure hearsay.

The Court: Yes.

Q. (By Mr. Collins): As a result of your telephone conversation with Captain Pavao, what did you do?

A. After the conversation?

Q. As a result of the conversation, what did you do?

A. I informed Cho that I was going to call Captain Pavao up again at 12 o'clock.

Q. Did you? A. I did.

Q. And what happened as a result of that telephone conversation?

A. At that time he told me the price of towing the sampan——

Q. No. Will you just tell us what happened as a result of the conversation. After you had your telephone conversation with Captain Pavao, you did certain things. We are interested in knowing what you did after that, rather than what Captain [201] Pavao told you on the telephone.

(Testimony of Ching Ho.)

A. I handed the telephone over to Cho.

Q. And he spoke on the telephone?

A. He spoke on the telephone.

Q. And what happened after that?

A. After that he gave me the telephone back and I talked to Pavao again.

Q. This was the same 12 o'clock conversation with Captain Pavao; is that correct?

A. That's right.

Q. As a result of this telephone conversation did you have any conversation with Mr. Cho?

A. I did.

Q. And what was the substance of that conversation?

A. At that time Captain Pavao told me——

Q. No. We will have Captain Pavao tell what he said. Will you tell us what you said to Mr. Cho, or what Mr. Cho said to you in the conversation.

The Court: After the telephone call.

Q. After the telephone call.

A. After the telephone call, I told Cho to get his—I gave him two six-hundred feet line to get his sampan ready to pull it off the reef.

Q. Was there any discussion of the telephone call with Mr. Cho? [202]

A. After the 12 o'clock 'phone?

Q. Yes. After that call was completed, did you have any discussion with Mr. Cho about the call?

A. I don't remember if I did.

Q. Well, then, what did you do after that?

(Testimony of Ching Ho.)

A. After that I gave him the lines to wrap around the boat to get ready to tow it off the reef.

Q. And then what happened?

A. Then I left Kaunakakai for Kolo.

Q. After going to Kaunakakai, what did you do then?

The Court: Kolo, you mean.

Mr. Collins: Kolo. I am sorry. Strike that question.

Q. (By Mr. Collins): After you arrived at Kolo, what occurred?

A. I waited off Kolo until the Tug Kolo brought the barge out from Kolo dock to where I can pick it up off Kolo there.

Q. What did you do with the barge?

A. I took it to Kaunakakai.

Q. Did you give the captain of the Kolo any orders? A. Yes, I did.

Q. And what was the substance of the orders you gave him?

A. I told him to proceed to Kaunakakai. [203]

Q. And you arrived at Kaunakakai thereafter?

A. I arrived at Kaunakakai at 4 o'clock.

Q. That was on what day? A. Tuesday.

Q. Was the Kolo there at that time?

A. He was there.

Q. And what happened on your arriving at Kaunakakai?

A. The Kolo was waiting there for me. After I docked the barge at Kaunakakai dock, he came



(Testimony of Ching Ho.)

alongside to pick me up to go out and to tow the sampan off the reef.

The Court: By that you mean you transferred onto his boat?

The Witness: I did.

Q. (By Mr. Collins): Will you explain the operation of towing the sampan off the reef?

A. We got off where the sampan was on the reef. The Kolo stayed in deep enough water where she can stay in position. We ran a line in from the Tug Kolo to the sampan on a small skiff.

Q. Did you go on board the sampan?

A. I was on board. I hooked it my myself.

Q. After the Kolo was rigged up, did you direct the operation of the Kolo? A. I did.

Q. And was the Kolo able to pull the sampan off? [204] A. No.

Q. After you observed that the Kolo could not pull the sampan off, what did you do?

A. I talked to Mr. Cho.

Q. What was the substance of that conversation?

A. To have the Mahoe tow the sampan off the reef, to assist the Kolo.

Q. And as a result of that conversation, what occurred?

A. He told me it was all right.

Q. And then what happened?

A. I went in and get the Mahoe.

Q. You towed with the Mahoe? A. Yes.

(Testimony of Ching Ho.)

Q. And as a result of your towing, what occurred?      A. The sampan came off.

Q. Will you describe the operation after that until we get it to the pier?

A. I went in and get the Mahoe and I came out and hook on the line to the Kolo's bow. We start pulling together, just pulling together slow, and the sampan came off the reef.

Q. Let us bring it into the pier. What occurred between that time and the time it was finally docked?

A. I let go my line and stood by until the Kolo took the sampan alongside the dock.

Q. When you were rigged up with the Kolo, were you [205] directing the operation?

A. I was.

Q. Did you give the captain of the Kolo any orders with respect to the docking of the sampan?

A. After he hooked up the sampan, he directed it himself.

Q. Did you bring the Mahoe into the—Did you dock the Mahoe, also?      A. I did.

Q. After all the vessels were docked, did you have any conversation with the owner of the sampan?      A. I did.

Q. What was the substance of that conversation?

A. I told him that the—that he might dive down and see whether he got his rudder or his propeller is still there.

Q. What occurred?

(Testimony of Ching Ho.)

A. He did, and he came up and he said the rudder and the propeller is banged up and not in condition to run.

Q. Did you have any discussion with him in connection with towage of this vessel to Honolulu?

A. I told him that the Kolo was going to lay in Kaunakakai overnight, that if he want Kolo to tow the sampan to Honolulu, he should call Captain Pavao and get his permission before the Kolo can pull it back. I gave Cho here Mr. Pavao's telephone number and he told me he was going back to his hotel and call him up. [206]

Q. Did you have any conversation with Joe Kahiapo in connection with towage to Honolulu?

A. I did. I told him that Cho was going to call Mr. Pavao up to get his permission for Joe to tow the sampan back.

Q. Did Kahiapo ever say to you that he intended to tow it back?           A. No.

Q. Did you ever give him orders to tow it back?

A. I did not.

Q. Would you tell the Court what the relative size of your tug and the Kolo is.

A. You mean the size between——

Q. Yes, the size of the two of them.

A. The Kolo is just a 65-footer. The Tug Mahoe is 125 foot. The Kolo is 250 horsepower. The Mahoe is 750 horsepower.

Q. And how do your crews compare in size?

A. I have thirteen men; the Kolo has two men.

(Testimony of Ching Ho.)

Q. When two tugs are working together, two Young Brothers tugs are working together, one of which is your tug, who normally gives the orders?

A. In that case I was giving the orders.

Q. On what basis were you giving the orders?

A. I was the senior captain at that time.

Q. So the junior tug captain takes the orders from the senior tug captain; is that correct? [207]

A. Yes.

Q. And what were the final instructions that you gave to Kahiapo before leaving?

A. Before leaving I told him not to—I told him to find out before he towed the sampan home the next morning.

Q. At any time that you were in the harbor at Kaunakakai did Mr. Cho say to you that he had received authority from Young Brothers to have the sampan towed to Honolulu? A. No, sir.

Q. Did he at any time say that he had made any agreement with Kahiapo to have it towed to Honolulu? A. Not while I was there.

Mr. Collins: That is all.

### Cross-Examination

By Mr. Quinn:

Q. You told Joe to find out, before he pulled the sampan away the next morning, whether he could; is that right?

A. Whether he could bring it back?

Q. Whether the Company would let him bring

(Testimony of Ching Ho.)

it back; so therefore he had told you that he intended to bring it back; is that right

A. He didn't tell me that.

Q. Why is it you say you told him to "find out before you bring it back tomorrow morning"?

A. I told him to find out from the port captain. [208]

Q. And what did he say when you told him that?

A. He said it was all right.

Q. He said what?

A. He said he will find out.

Q. He said he would find out. That is Joe talking? A. Joe.

Q. When you left, was there any other Young Brothers tug in the harbor of Kaunakakai?

A. Just the Kolo.

Q. So the Kolo was the senior Young Brothers tug captain there when you left; is that right?

A. He was the only tug there.

Q. That's right. How long had you been a tug captain?

A. I have been with Young Brothers for 19 years. I was tug captain since 1933.

Q. You are a very experienced tug captain; I take it you have been on several salvage operations then. A. I was.

Q. When a prospective customer of Young Brothers asks that something be done, do you usually tell the questioner to call the Company to see whether you can do it? A. In what way?

(Testimony of Ching Ho.)

Q. Isn't it a bit unusual if you would tell Mr. Cho to find out whether Joe has Company authority to tow this sampan to Honolulu? [209]

A. I wanted him to talk to Mr. Pavao.

Q. Why didn't you tell Joe to call Captain Pavao?

A. I told Joe to find out whether he can tow it or not.

Q. Did you tell Joe to call Captain Pavao?

A. No.

Q. But you told Mr. Cho to call Captain Pavao?

A. That's right.

Q. To see whether Joe could tow the sampan to Honolulu; is that right? A. No.

Q. What did you tell Mr. Cho?

A. I told Mr. Cho that the Kolo was laying there overnight, for him to make arrangements with Mr. Pavao for the Kolo to tow the sampan back, if it is all right with Mr. Pavao.

Q. So you told him. You told Mr. Cho to make arrangements with Mr. Pavao, and you told Joe to make arrangements with Mr. Pavao?

A. I told him to find out whether he did or not.

Q. To find out from whom? A. From Cho.

Q. Do you know what a tug owner's and a tug master's responsibility is if they leave a menace to navigation in a harbor?

A. You mean a tug owner, or a tug master?

Q. Yes. Did you get my question? [210]

A. I didn't quite get it.



(Testimony of Ching Ho.)

Mr. Quinn: Would you read the question back.

(Question read.)

The Court: Do you understand the question?

The Witness: I don't quite.

The Court: Did you hear it?

The Witness: Yes, I did.

The Court: But you don't understand it?

The Witness: No.

Q. (By Mr. Quinn): If you towed a ship into Kaunakakai Harbor and it sank in the harbor, what would you as a tug master have to do, if you know?

A. I know a ship that is going to sink, I wouldn't tow it in the harbor.

The Court: But he is asking you, suppose it did sink.

Mr. Quinn: Thank you, your Honor.

The Court: He is asking you to suppose it did sink.

The Witness: In the harbor, you mean?

The Court: Yes. Supposing a tow that you brought into a harbor did sink. That is what he is asking you to assume. He is not saying that this Tenyo Maru sank. This is a hypothetical, theoretical question. He is asking you to assume those facts. Now, assuming those facts, he is going to ask you a question. Go ahead.

Q. (By Mr. Quinn): I would just like to know, Captain, [211] what you would do if your tow sank in a harbor. A. I would notify——

(Testimony of Ching Ho.)

Q. What you would be compelled to do.

A. I would notify the office that my tow sank.

Q. You don't know of any duties you have, irrespective of whether you are employed by Young Brothers or anybody else; is that right?

Mr. Collins: I think that question might be clarified. It is a pretty broad question: You don't know what your duties are.

Mr. Quinn: Very well.

Q. (By Mr. Quinn): As far as you know, you would have no duties with respect to a tow of yours which did sink in a harbor, whether or not you were working for Young Brothers, just as a tug master?

A. I would see that she won't sink in a harbor like that.

Q. You say that on Monday, April 5, you were instructed by Captain Pavao to go to Kaunakakai to assist the Tenyo Maru off the reef; is that right?

A. Yes.

Q. Were you told at that time that the Kolo would be there?

A. He told me that the Kolo went up to Kaunakakai.

Q. Did he tell you that the Kolo had been ordered to [212] help them off the reef if he could?

A. Yes, he did.

Q. So you didn't know, when you were going to Kaunakakai, whether or not the ship might already be off the reef?

(Testimony of Ching Ho.)

A. I got up to Kolo that morning and Kahiapo told me.

Q. Answer the question. I am asking you about Monday when you were talking to Captain Pavao and receiving your orders and you were told to go to Kaunakakai to assist the Tenyo Maru off the reef; you say that you knew the Kolo was up there; is that right? A. Yes.

Q. Now, then, you didn't know whether or not the Tenyo Maru might already be off the reef when you got there; is that right?

Mr. Collins: If your Honor please, I believe the witness was answering that question. There was one stop that was made before Kaunakakai and he was explaining what happened there that would influence his knowledge before he hit Kaunakakai.

Mr. Quinn: I am not asking his knowledge when he hits Kaunakakai, if the Court please. Mr. Collins is attempting to show that this was the boss man, this was the man who was necessary to pull it off the reef, and he was the one to give the orders, the one who gave the orders; whereas, in fact, it might be that the Kolo, the flat bottom tug, could have towed [213] it off and could have had authority to tow it off, and it could have been at the pier, and he would have known nothing about it; and that is the end of the matter.

The Court: I am not clear whether or not this captain knew, prior to his leaving Honolulu on Monday, of the fact that the captain of the Kolo had

(Testimony of Ching Ho.)

been given instructions with respect to the Tenyo Maru.

Mr. Quinn: I believe I just asked him that question before this question, your Honor, and he answered 'yes' as I recall. Is that your recollection?

Mr. Collins: That is my recollection.

The Court: Did you know, before leaving Honolulu on Monday, that Joe Kahiapo, captain of the Tug Kolo, who had preceded you to Molokai, had been given some instructions with respect to assisting the Tenyo Maru off the reef?

The Witness: That was told by Captain Pavao.

The Court: You knew that?

The Witness: Yes.

The Court: Now, Mr. Quinn's question to you: Therefore, the Tug Kolo having already arrived on Molokai before you left Honolulu, you didn't know whether or not you might not arrive over there and find that the Tug Kolo had the job already done.

Mr. Quinn: That is right.

The Court: Isn't that right? It was possible?

The Witness: It was possible.

The Court: There might have been no job for you to do when you got there—of that nature?

The Witness: That is right.

Q. (By Mr. Quinn): Did you have any discussion with Captain Pavao with respect to towing the Tenyo Maru to Honolulu? A. No.

Q. He didn't tell you to tow it to Honolulu, did he? A. No.

(Testimony of Ching Ho.)

Q. He didn't tell you not to tow it to Honolulu, did he?      A. I didn't talk to him about towing.

Q. You didn't talk to him at all about that?

A. No.

Q. He didn't tell you at that time to issue any orders to the captain of the Kolo, one way or the other, about towing to Honolulu, did he?

A. No, sir.

Q. When did you first get to Kaunakakai?

A. Nine o'clock Tuesday morning.

Q. That was after you had already gone to Kolo, or before?

A. I stopped at Kolo before I go to Kaunakakai.

Q. You stopped at Kolo, then you went to Kaunakakai; then did you go back to Kolo and get your barge?      A. I did.

Q. And then came back to Kaunakakai again?

A. Yes.

Q. When you got to Kaunakakai Tuesday morning, was the Kolo there?      A. No, sir.

Q. The Kolo was at Kolo?      A. Kolo.

Q. And did you then see whether the Mahoe could pull the Tenyo Maru off the reef?

A. I looked at the Tenyo Maru. I knew I can't pull it off the reef.

Q. You had too deep a draft?

A. Too deep a draft and the equipment was not ready for me to tow it off.

Q. You would have to do it almost immediately in order to make your——

A. Kolo run.

(Testimony of Ching Ho.)

Q. (Continuing)—Kolo run. Now, at that time, Tuesday morning, when you were there, before you went back to Kolo, do you say you called Captain Pavao?  
A. I did.

Q. And your conversation then dealt with the question of taking the sampan off the reef; is that right?  
A. Yes.

Q. Did you have any conversation with him at that time about towing to Honolulu? [216]

A. No.

Q. You didn't know whether it would be necessary or desirable at that time, did you?

A. That's right.

The Court: Speak louder. You said, "That is right"?

The Witness: That is right.

Q. (By Mr. Quinn): Now, then, you returned and called Captain Pavao again about noon?

A. I was still there then.

Q. That was before you made your pineapple run?  
A. That's right.

Q. What had you done from 9 to 12? Looked over the Tenyo Maru?

A. The Tenyo Maru and talking to Cho.

Q. And talking to Cho. And you were instructing him how to rig the Tenyo Maru for the tow job; is that correct?  
A. That is right.

Q. Why did you happen to call Captain Pavao two times that morning?

A. He told me, after I talked with him at 10



(Testimony of Ching Ho.)

o'clock, he told me to call back at 12; he will talk to Mr. Harrison.

Q. How much it would cost to tow it off the reef?

A. Off the reef.

Q. And you did call at 12. Did Captain Pavao tell you how much it would cost to tow it off the reef? [217]

A. He told me and I handed the 'phone to Cho.

Q. The Tenyo Maru was still one the reef; is that right? A. That is right.

Q. No discussion about any towing to Honolulu at all? A. No, sir.

Q. What time did you finish your towing operations at Kolo?

A. You mean when I get back to Kaunakakai?

Q. Yes, when did you get back to Kaunakakai?

A. At 4 o'clock.

Q. Four o'clock. What time did you leave Kaunakakai that evening? A. Six thirty.

Q. Six thirty. How long did it take you to get on the Kolo and direct its operations and find that it couldn't tow the Tenyo Maru off, so changed to the Mahoe? How long did that entire operation of towing the Tenyo Maru off and back to the pier take?

A. We left the pier at 4:15 to go to the Tenyo Maru. We was all tied up at Kaunakakai dock again at 6 o'clock.

Q. Fast job. Now, when you were tied up at the pier, how did the subject of towing to Honolulu first come up?

(Testimony of Ching Ho.)

A. Well, I told him to find out whether he had his propeller and rudder on yet.

Q. Yes. [218]

A. He dived down and said he didn't have his rudder on, so I told him the Kolo was laying there overnight. I gave him Mr. Pavao's telephone number so he can get permission to have the Kolo tow it to Honolulu.

Q. And you indicated that the Kolo was fit for the job and the Tenyo Maru was fit to be towed, if Captain Pavao said so; is that right?

A. Yes, sir.

Q. Did you examine the bottom of the Tenyo Maru?

A. You can't see the bottom. She was under water. I looked in the engine room.

Q. Did she have a leak?

A. She had a lot of water in there, must be leaking.

Q. You told Cho then that the Kolo would be there overnight and would be available to tow him back if Captain Pavao said it was all right?

A. Yes, sir.

Q. Was Joe there at the time that you talked to John Cho?      A. No, I don't think so.

Q. Where was he?

A. He was on my tug, Mahoe.

Q. And this was after you were tied up at the pier, was it?      A. Yes. [219]

(Testimony of Ching Ho.)

Q. After the Tenyo Maru was tied up at the pier? A. Yes.

Q. And you were making ready to set sail for Honolulu? A. Yes.

Q. The Mahoe was; is that right?

A. I was on the Tenyo Maru then.

Q. But I mean within that half hour you were going to take off and head for Honolulu; is that right? A. Yes, sir.

Q. And you were speaking to Mr. Cho on the Tenyo Maru? A. Yes.

Q. And Joe was on the Mahoe? A. Yes.

Q. Then after you spoke to Mr. Cho, you went over to the Mahoe, did you? A. Yes.

Q. And Joe was over there? A. Yes.

Q. And that is when you told Joe that you had told John to call Captain Pavao; is that right?

A. Yes, sir.

Q. And as far as your present recollection is concerned, Joe didn't say that he thought that was part of the salvage job and he had been told to do it?

A. Towing it home? [220]

Q. Yes.

A. He didn't say anything about it.

Q. Are you sure he said nothing about that?

A. No.

Q. You are not sure?

A. I am sure he didn't say anything about towing.

Q. You are sure he didn't say anything about towing it back to Honolulu? A. Yes, sir.

(Testimony of Ching Ho.)

Q. He didn't say anything about having authority to tow it back by virtue of having been directed to salvage it?

A. He didn't say anything to me about it at that time.

Q. Did you ever hear any figures about fifty dollars an hour for the Mahoe and thirty-five dollars an hour for the Kolo in connection with this operation?

A. I don't remember anything like that.

Q. You were never told those figures?

A. I don't remember whether I did or not.

Q. Could you have been told those figures by Captain Pavao, for instance?

A. No, sir.

Q. What price did Captain Pavao say for pulling the Tenyo Maru off the reef?

A. About \$200.

Q. About \$200. So you don't recall now hearing any [221] statement about \$50 an hour for one tug and \$35 an hour for another? A. No, sir.

Q. Do you recall Joe's telling you, after you gave him a message about Captain Pavao—Do you recall his telling you that he intended to take the boat back the following morning? A. No, sir.

Q. Would you deny that he told you that he intended to take the Tenyo Maru back the next morning? A. What was that again?

Q. Would you deny that Joe Kahiapo told you Tuesday afternoon that he intended to take the

(Testimony of Ching Ho.)

Tenyo Maru under tow back to Honolulu the following morning?      A. He didn't tell me that.

Q. You deny that he told you that?

A. He didn't tell me he was going to take it to Honolulu.

The Court: Did he tell you he was going to take it anywhere?

The Witness: He didn't mention anything that he was going to take it.

The Court: At this point, Mr. Quinn——

Mr. Quinn: I have no further questions.

The Court: I would like to make sure I heard something correctly. Did I understand you to say, Captain, that after the Tenyo Maru was tied up at the pier of Kaunakakai [222] and you had been aboard it and looked at the damage as best you could, and had a report from Mr. John Cho that his rudder and his propeller were damaged, that after you were conscious of the fact that the Tug Kolo was going to remain there overnight, and so forth, that it was your opinion and is your opinion today that the Tug Kolo was capable of towing the Tenyo Maru to Honolulu and that the Tenyo Maru in its then condition was then capable of being towed successfully to Honolulu by that Tug Kolo? Did I understand you to say that?

The Witness: If he had permission from Captain Pavao.

The Court: If he had permission?

The Witness: Yes.

(Testimony of Ching Ho.)

The Court: I understood you correctly?

The Witness: Yes.

The Court: Based on that——

Mr. Quinn: I may have additional questions, your Honor.

The Court: All right. I think I will take a final morning recess.

(Recess had.)

Q. (By Mr. Quinn): Captain, when you were at Kaunakakai Tuesday morning looking over the situation to see whether the Mahoe might be able to tow the Tenyo Maru off the reef—Do you know the time I am talking about?—before you went to [223] Kolo to do your pineapple barge operation, you went aboard the Tenyo Maru?

A. No, I did not.

Q. When you instructed Mr. Cho to rig the vessel for towing, you didn't go aboard the Tenyo Maru?

A. No.

Q. Where did you talk to Mr. Cho?

A. On the dock.

Q. On the dock. When you came back and before you towed the Tenyo Maru off the reef, did you ever go aboard her?

A. I went aboard her after we hooked up to the Tenyo Maru.

Q. You did go aboard the Tenyo Maru?

A. Yes, I did.

Q. Can you describe for the Court the type of



(Testimony of Ching Ho.)

hole she had developed in her side as a result of the banking on the reef?

A. You mean on the Tenyo Maru?

Q. Yes.

A. I didn't see any hole, just the way she was resting on the rocks there.

Q. You didn't see that?

A. I saw where she was resting on the rocks.

Q. And did you see what had happened to the planking as a result of resting on the rocks? [224]

A. Just smashed in.

Q. And can you describe how much it was smashed in?

A. Just the planking where she was resting on the rocks.

Q. You say it was smashed in?

A. Just where the big boulder was there and where she was resting on the reef there.

Q. In such a situation, in your opinion, when it was taken off the reef, did you think it would leak?

A. After she got off the reef?

Q. Yes. A. Yes, she did.

Q. Well, did it leak much? A. Yes, it did.

The Court: If I understand it correctly, it was leaking when it was on the reef.

Mr. Quinn: As I recall the testimony, your Honor, it is that it would leak up to a certain point because it was not necessary at that time, because of the height of the vessel on the reef, to use the pump.

(Testimony of Ching Ho.)

The Court: But it was leaking?

Mr. Quinn: Well, it was leaking, or had already leaked up to its volume.

I have no further questions.

### Redirect Examination

By Mr. Collins: [225]

Q. Captain, on Tuesday afternoon, after the Tenyo Maru was brought into the pier, was there any discussion with Mr. Cho about patching the hole?

A. We had. He told me the next morning he would have a crane to tip the sampan over and patch that up.

Q. Did you tell Mr. Cho that the Tenyo Maru was fit to be towed to Honolulu in the then condition? A. I did not tell him that.

Q. When the Judge asked you whether, in your opinion, at that time, the Tenyo Maru was fit to be towed to Honolulu, were you thinking in terms of the patch or without a patch?

A. You mean to tow it to Honolulu?

Q. Yes. A. With the patch on.

Q. As it stood at that time, without the patch, was it your opinion that it could be towed in?

A. No.

Q. Do you normally, on this pineapple run, go into Kaunakakai? A. Go into Kaunakakai?

Q. Do you, on this pineapple run, taking the

(Testimony of Ching Ho.)

barge down to Kolo, do you normally go into Kaunakakai anyway?

A. To wait for the Kolo barge.

Q. You misunderstand me. In your normal operation, when you take a barge down to Kolo, after you have left the [226] barge at Kolo, do you normally go to Kaunakakai?

A. No. Sometimes we anchor at Kolo.

Q. But if you don't anchor at Kolo?

A. If we don't anchor at Kolo, we go to Kaunakakai.

Q. And whether you anchor or not depends on the sea conditions, I assume.

A. Yes, sir.

Mr. Collins: That is all.

The Court: Any further questions?

Mr. Quinn: No questions.

The Court: You are excused.

(Witness excused.)

Mr. Collins: Mr. Pavao.

## WILLIAM PAVAO

called as a witness on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

The Clerk: Sit down, please.

The Court: Will you state your name, age, residence, occupation and citizenship.

The Witness: William Pavao.

The Court: Age?

(Testimony of William Pavao.)

The Witness: Age 44.

The Court: Residence?

The Witness: Residence, 2113 Metcalf Street.

The Court: Honolulu? [227]

The Witness: Honolulu.

The Court: Occupation?

The Witness: Captain, Young Brothers tug.

The Court: And you are a citizen of the United States?

The Witness: Yes.

The Court: Exclusively?

The Witness: Yes.

The Court: Take the witness.

### Direct Examination

By Mr. Collins:

Q. What was your occupation on or about April 4, 1948? A. Port captain for Young Brothers.

Q. What are your duties as port captain?

A. Dispatching tugs for the jobs.

Q. Is it your job to give instructions to each tug on each job? A. Yes.

Q. On April 5 did you give any instructions to the captain of the Tug Kolo?

A. Tug Kolo, the only instructions I gave him, the pineapple tug to Kolo.

Q. In what form were those instructions?

A. There was written orders before that, though. That was on Friday.

Q. Those were the only instructions that you gave? [228] A. Yes.

(Testimony of William Pavao.)

Q. Did you order the captain to do anything before he shoved off?      A. No.

Q. When the Tug Mahoe left on or about that day, did you give any instructions to the captain of that boat?      A. About the pineapple barge.

Q. Did you give him any instructions with respect to the Tenyo Maru?      A. No, I did not.

Q. Did you give any instructions to Kahiapo on the Kolo with respect to the Tenyo Maru?

A. No, I did not.

Q. Did you have any conversation or communication with anybody on Sunday, April 4, in connection with the Tenyo Maru?

A. No, I did not.

Q. On Tuesday, April 6, did you have any conversation with anybody in connection with the Tenyo Maru?      A. Yes, I did.

Q. And what was the nature of that conversation?

A. That was around ten o'clock on Tuesday morning. Captain Ching Ho called in from Kaunakakai about the sampan on the reef, and he wanted to get orders what he is supposed to do. In the meantime I told him that Mr. Harrison was having a directors' meeting and he will have to call back around noon. [229]

Q. And did he call back?

A. About noon the directors' meeting was all over, and I talked to Mr. Harrison about the sampan, wanted to quote a price pulling off the reef,

(Testimony of William Pavao.)

and they didn't have any lines; and he said around \$200 to pull the sampan off the reef, and about the money we will have to wait until he gets to Honolulu to settle the money.

Q. In this ten o'clock telephone call that you had from Captain Ching Ho, was there any discussion as to towage to Honolulu?

A. No, none at all.

Q. In the discussion that you had with Mr. Harrison after that ten o'clock telephone call, was there any mention made of towage to Honolulu?

A. No, none.

Q. You say that you received a second telephone call from the captain of the Mahoe on that day?

A. Yes, I did.

Q. What was the substance of that?

A. That is twelve o'clock, and I told him about what Mr. Harrison told me, the price and just to tow the sampan off and keep on with his pineapple, to have the Kolo, and give lines, and assist the sampan off the reef. And Mr. Cho there grabbed the 'phone, and he said he was a poor man; he didn't have any money. And I told him, it is all right; we will get [230] the sampan off the reef, and then we have Ching Ho back on the 'phone and I gave him the orders.

Q. Was there any discussion in this telephone conversation with Mr. Cho concerning towage to Honolulu?

A. No.

Q. It was never mentioned at all?



(Testimony of William Pavao.)

A. Nothing at all.

Q. Had you had any previous conversation with Mr. Cho?      A. No, I did not.

Q. How long have you been port captain?

A. I have been port captain for nineteen years.

Q. With Young Brothers all that time?

A. Twenty-six years.

Q. Twenty-six years with Young Brothers. Could you tell us something about the operating procedure on towage jobs, how the jobs are assigned and what the arrangement is that is entered into for the various towing jobs?

Mr. Quinn: I object to the introduction of evidence with respect to Young Brothers towage jobs as not being material to the issues in this case, if the Court please.

The Court: What would be the purpose when it is obvious that you contend no such rules or regulations or formalities were complied with?

Mr. Collins: Our purpose was merely to establish the limitations on the authorities of the captains of the various [231] tugs with respect to towage jobs.

Mr. Quinn: If the Court please, unless you want to give some foundation that John Cho was familiar with the rules and regulations, that also would be completely immaterial even for that purpose; but, irrespective of the question of the actual authority of these various captains, we have had at great length the evidence of what transpired with respect

(Testimony of William Pavao.)

to this transaction, and I see no materiality whatsoever in introducing now what they do in a number of other towing transactions.

Mr. Collins: I believe that the general practice and policy of the Company, the well established rules, are a matter of distinct relevancy, your Honor.

The Court: I can't particularly see it, but go ahead and see where it may become relevant.

Q. (By Mr. Collins): Do you recall the question?

A. Yes. All jobs comes into the office. We dispatch them to the tugs, what ships are—what pineapple barges are to be towed; and all orders come from the office.

Mr. Collins: No further questions.

The Court: Cross-examination?

### Cross-Examination

By Mr. Quinn:

Q. Captain Pavao, is there any special meaning which you people at Young Brothers attach to the word "salvage"? What does "salvage" mean to you? [232]

A. Salvage?

Q. Yes.

A. You mean to pull something off the reef. That is all I know.

Q. Take it to a safe place?

A. Safe dock and tie him up; that is all.

(Testimony of William Pavao.)

Q. Would that include a place where it could be fixed?  
A. Well, the first dock.

Q. The first dock—— A. Ties them up.

Q. Suitable for making repairs necessary?

The Court: Both of you were talking at once.

Mr. Quinn: I think he kept nodding his head.

The Court: Go over that again. I didn't get it.

Q. (By Mr. Quinn): The first dock, Captain Pavao, suitable for making repairs to put her in condition?

A. Have to be before you can do anything else, in the first dock in smooth water.

The Court: Captain, either you are not giving us full answers or you are not talking as loud and distinctly as you might. What Mr. Quinn wants to know is whether or not, in your opinion, as a man with 19 years' experience in this tug boat business, a salvage operation is completed when a boat is taken off the reef and brought to any safe harbor; or is it completed only when it is brought off the reef to the [233] type of harbor where it can be repaired efficiently?

The Witness: My experience, when you pull the ship off the reef and you tie it up to any dock where it can be repaired, safe dock.

Q. (By Mr. Quinn): You never discussed this Tenyo Maru situation with the captain of the Kolo at all?  
A. None at all.

Q. When did the Kolo leave for Kolo?

(Testimony of William Pavao.)

A. The Kolo left on Monday morning, eight o'clock.

Q. Were you aware of any instructions that had been given it with respect to the Tenyo Maru?

A. No.

Q. If instructions had been given it, would you normally have been aware of them?

A. I had orders from Mr. Harrison to Joe to go upstairs, Joe Kahiapo, the operator of the Kolo.

Q. To go upstairs?

A. To see Mr. Harrison.

Q. But you don't know what transpired between Joe and Mr. Harrison? A. No, I don't know.

Q. And as far as you knew, then, the Kolo was going no place but to Kolo? A. To Kolo.

Q. You are the man who is charged with keeping track of [234] the operation of these tugs?

A. Yes, sir.

Q. Mr. Harrison didn't tell you he had diverted the Kolo?

A. Afterwards he told me the Kolo was going to Kaunakakai.

Q. When did he tell you that?

A. After he got through talking to Joe.

Q. Before the Kolo left, you knew it was going to Kaunakakai; is that right? A. Yes.

Q. So then your answer to Mr. Collins, that the only instructions for the Kolo were to go to Kolo is not entirely accurate, because you knew there were other instructions; is that right?

(Testimony of William Pavao.)

A. Yes, but my orders was for pineapple; that is what he was asking.

Q. So when you so answered Mr. Collins' question or comment, as far as you were concerned any orders you had given were to go to Kolo?

A. Yes.

Q. But you knew Mr. Harrison had given orders to stop at Kaunakakai? A. Yes.

Q. Now, with respect to the Mahoe, what were your instructions to the Mahoe?

A. Pineapple barge, to Kolo, Kaunakakai. [235]

Q. And as far as you knew, the Mahoe had no instructions with respect to the Tenyo Maru?

A. None at all.

Q. Now, I know you didn't give him any instructions, but are you sure that you didn't know of any instructions that might divert the Mahoe?

A. No.

Q. So, as far as you were concerned, the Mahoe was off course when it was in Kaunakakai?

A. Pineapple barge; it wasn't off course at all.

Q. When it was in Kaunakakai harbor before it picked up its pineapple barge at Kolo?

A. The Mahoe went out with two barges; dropped one at Kolo and one at Kaunakakai, and waited at Kaunakakai until it got orders for Kolo at 1 p.m.

Q. But you didn't know that the Mahoe had been given instructions to assist the Kolo in taking the Tenyo Maru off the reef?

(Testimony of William Pavao.)

A. No, none at all. He didn't have no orders until he telephoned down to me, when he called me up at noon.

Q. Are you sure that the Mahoe had no orders until he called you at noon? A. Yes.

Q. You are positive that Mr. Harrison gave no orders to the Mahoe? [236]

A. No, I didn't hear anything about it.

Q. You didn't hear anything about it, but if I were to tell you that Mr. Harrison testified he had given some orders to the Mahoe, would you then deny that he had?

A. No, I didn't know anything about it.

Q. If I were to tell you that Ching Ho had testified that he had received orders from you that he was to assist the Kolo with the Tenyo Maru, would you continue to deny that you had issued those orders? A. Not when he left here.

Q. I am telling you that if I were to tell you he testified that you so instructed him on Monday, April 5, would you still deny it? A. Yes.

Q. That does not refresh your recollection?

A. No.

Q. Now, is it a regular practice at Young Brothers for orders to be issued to tugs without your knowledge, and in addition to such orders as you give to the tugs?

A. Well, at times there the boss gives orders to the tugs, and sometimes I do.



(Testimony of William Pavao.)

Q. And sometimes the boss fails to advise you that he has given orders to tugs?

A. Sometime he by-pass and he forget about it, and sometimes he don't. [237]

Q. And this was a double by-pass; is that right?

A. Well, Mr. Harrison is a new boss at Young Brothers. Mr. Young died, and there is different routines of working down there, too. Mr. Young works one way and Mr. Harrison works some other way.

The Court: Mr. Quinn, you made a statement that I don't think is right. You said that Mr. Harrison testified that he gave instructions to Captain Ho. I think you are confused.

Mr. Quinn: I stated that hypothetically, but I then checked back, and I believe there was a mistake. I then framed the same question with respect to Ching Ho. I would be glad to have that stricken, and apologize.

I also apologize to you.

I have no further questions.

The Court: Very well. It is 12 noon. We will resume at 1:30, unless you have just a few questions.

Mr. Collins: I might say I have no further questions of this witness, your Honor. That completes the Libellee's case.

The Court: All right, but I have a question I want to get cleared up on, the same one I asked, based on a question that was asked before.

Getting back to the salvage business, you remem-

(Testimony of William Pavao.)

ber the question Mr. Quinn asked you, and I asked it over again? [238]

The Witness: Yes.

The Court: You are familiar with the harbor at Kaunakakai?

The Witness: Yes.

The Court: And facilities there available?

The Witness: Yes.

The Court: Based on your experience and this situation that is on trial here, in your opinion was the salvage operation completed when that Tenyo Maru was pulled off the reef and taken to the pier at Kaunakakai harbor?

The Witness: Yes. Kaunakakai harbor is very smooth water in there and you have cranes, big CPC cranes, larger cranes working at the docks, and you have shallow waters; you can run the boat up on the beach for repairs, and it is a very nice harbor at Kaunakakai. You cannot pick any better harbor on Molokai coast.

The Court: Based on that, have either of you any further questions?

Mr. Quinn: I have.

#### Cross-Examination

(Continued)

By Mr. Quinn:

Q. If I were to tell you the CPC crane was not large enough and repairs could not be effected at Kaunakakai, would you still say that the salvage operation was completed when the tow was deposited there? [239]

(Testimony of William Pavao.)

A. In Kaunakakai harbor the CPC crane would pick up ten ton.

The Court: What did the Tenyo Maru weigh?

Mr. Cho: Had a net of nine ton, but she weighed more.

Mr. Quinn: The only evidence, if the Court please, is that the CPC crane there was used in an attempt to make repairs, and it was then determined, if the Court please, that the CPC cranes were not heavy enough.

The Court: All I know is a CPC crane tried and failed to lift the boat.

Mr. Quinn: And that the conclusion was then reached that repairs could not be made at Kaunakakai.

The Court: What I am trying to insinuate is that it wasn't clearly foreclosed that they tried, and used the biggest crane that was available.

Mr. Quinn: That is true, except by inference, your Honor, which I think is a fair and reasonable inference, that they tried the crane and then concluded that there was nothing there that would aid them to repair the sampan.

The Court: Do you know the weight of the Tenyo Maru?

The Witness: The Tenyo Maru weighed nine ton.

The Court: Now, that is unloaded?

The Witness: Well, the engine on—It all depends—There [240] is no fish on; just a little fish.

(Testimony of William Pavao.)

The Court: And without water?

The Witness: Without water. Because in this Kaunakakai we had one example on the Mahoe, which she break the shaft on the way up and the crane picked the Mahoe stern right off, took the wheel off and everything, and I don't see why those two cranes up there couldn't work the sampan at Kaunakakai.

The Court: How much does the Mahoe weigh?

The Witness: The Mahoe weighs about 225 ton. It just hold the stern up where she was being repaired and took off the wheel, and she came home without the wheel. We done temporary repairs up there like that.

The Court: Are you familiar with the cranes that the CPC has?

The Witness: Yes.

The Court: Does it have more than one crane?

The Witness: Yes, they used to have three down there. They have two down there now.

The Court: Do cranes work in tandem as tugs do?

The Witness: Tandem?

The Court: You can use three cranes at once on one job?

The Witness: Yes, you can use two cranes on a heavy lift. [241]

The Court: I have perhaps opened up something which may cause both of you to want him to come back. Do you? Either of you?

(Testimony of William Pavao.)

Mr. Collins: I have no further questions.

Mr. Quinn: Nor I, your Honor. I think that is relatively immaterial.

The Court: All right. You are excused. And that is your case?

(Witness excused.)

Mr. Collins: Yes.

The Court: Do you have rebuttal?

Mr. Quinn: Yes, your Honor.

The Court: All right. 1:30?

Mr. Quinn: Yes, that is satisfactory.

The Court: All right. 1:30.

(Thereupon, at 12:05 p.m. a recess was taken until 1:30 p.m. of the same day.)

Afternoon Session—1:30

Mr. Quinn: Will you take the stand, Mr. Cho.

JOHN Y. K. CHO

recalled as a witness on behalf of the Libellant, having been previously duly sworn, was examined and testified further as follows: [242]

The Court: You are the Plaintiff, John Cho, and you have heretofore been sworn; I remind you that you are still under oath.

The Witness: Yes, sir.

(Testimony of John Y. K. Cho.)

Redirect Examination

By Mr. Quinn :

Q. Mr. Cho, do you remember having a conversation with the captain of the Mahoe after the Tenyo Maru had been towed off the reef and taken to the pier at Kaunakakai? A. Yes, sir.

Q. And what did the captain of the Mahoe tell you?

A. Captain of the Mahoe told me to call the home office about the towing.

Q. Why didn't you call the home office?

A. Because, well, that night when I dived under to fix the rudder and the prop, I couldn't tell because the water being so dirty, so the next morning I wanted the crane to lift it up and see the extent of the damage before I do anything about towing.

Q. Yes. Why didn't you call the home office the next morning?

A. Then, the next morning Joe told me that he is taking—he has authority to take the boat in tow.

Q. So when Joe told you that, you then thought that there was no further necessity of calling? [243]

A. He told me in these words: "You don't have to call the home office because I have authority to take the boat in tow."

Q. On the matter of the cranes at Kaunakakai, how many cranes were at the pier or in the vicinity?

A. There were two cranes.

Q. Belonging to whom?

A. The CPC Company.



(Testimony of John Y. K. Cho.)

Q. How many cranes did you use in your attempt to effect some repairs there?

A. One crane, because the other one was not in working condition.

Q. What?

A. Was not in working condition. It was broken.

Q. Was not in working condition?

A. Yes, was not in working condition.

Q. Were you able to effect any repairs using the one crane?

A. No, we couldn't because it would be dangerous for the men to go under because you couldn't get at it and the crane couldn't lift the boat high enough to fix it.

Q. What was the capacity of the crane you were using?

A. The guy told me the capacity was seven ton.

Q. And the other crane that was not in working condition—— [244]

A. Was not in working condition.

Q. Was it a bigger crane?

A. It was the same type of crane.

Mr. Quinn: No further questions.

### Recross-Examination

By Mr. Collins:

Q. On Wednesday morning you say that Joe told you that he had authority to take the tow. Did he at any time previous to that say that he had that authority?

(Testimony of John Y. K. Cho.)

A. Will you give me that question again, please?

Q. Did Joe at any time previous to Wednesday tell you that he had authority to take your sampan in tow?

A. That point did not come up whether he did or whether he didn't.

Q. He never said that to you before?

A. No.

Q. Does Libby have a crane at Kaunakakai?

A. What do you mean "have a crane at Kaunakakai? Do you mean on the pier?

Q. Yes.

A. They have two cranes on the pier.

Q. Together with the two CPC cranes?

A. I guess that's what it was, two CPC cranes. There were two cranes on that pier there.

Q. Do you know to whom the cranes belonged?

A. CPC.

Q. Well, do you know whether Libby has a crane there? A. I do not know.

Mr. Collins: That is all.

The Court: You are excused.

(Witness excused.)

Mr. Quinn: Call Mrs. North, please.

## PRICILLA NORTH

called as a witness on behalf of the Libellant, being first duly sworn, was examined and testified as follows:

(Testimony of Pricilla North.)

The Court: Will you please state your name.

The Witness: Pricilla North.

The Court: Miss or Mrs.?

The Witness: Mrs.

The Court: Can you tell me that you are over 21?

The Witness: Yes.

The Court: And you live here in Honolulu?

The Witness: Yes.

The Court: Are you employed?

The Witness: No, I am a housewife.

The Court: Are you a citizen of the United States?

The Witness: Yes.

The Court: Only?

The Witness: Yes.

The Court: Take the witness. Speak loud enough [246] so they can hear you.

### Direct Examination

By Mr. Quinn:

Q. Mrs. North, what is your relationship to John Cho?      A. I am his sister.

Q. Were you aware of the difficulties in which the Tenyo Maru was when it was on the reef at Molokai?      A. Yes, I did.

Q. When were you first advised that the Tenyo Maru had been taken off the reef?

A. I believe it was the day before my brother called me from Molokai saying that the boat was sunk. I got this call because ever since my brother

(Testimony of Pricilla North.)

left for Molokai I had been calling Young Brothers to get information. And this person I spoke to—I believe it was Mr. O'Neill—gave me this information from time to time, that he hadn't heard, that he was concerned, and that the Kolo was overdue, I believe, and then finally it was late that evening, that same evening, he called me saying he knew I was very much concerned about the boat and not to worry is was off the reef and was being towed back. And I got that call——

Q. Being towed back where?

A. To Honolulu.

Q. About what time in the evening was that?

A. I don't recall exactly what time, but it was—well, [247] I would say about 7:30, I believe. It was dark but it wasn't late at night. It was in the evening and not very close to midnight. It was about 7:30 or 8 o'clock.

Mr. Quinn: Your witness, Mr. Collins.

### Cross-Examination

By Mr. Collins:

Q. What day was this, Mrs. North?

A. It was the day before I got the news that the Tenyo Maru had sunk.

Q. Well, could you place that in the week at all?

A. Pardon?

Q. What day of the week was that?

A. Well, I believe it was on a Wednesday, be-

(Testimony of Pricilla North.)

cause, if I recall, the boat—well, it was Wednesday, I believe.

Q. You received this call on Wednesday?

A. Yes.

Q. Is there any particular way that you can fix it in your mind as being Wednesday?

A. Well, the way—well, Tuesday was the day that I was told, you know—John was in Molokai; he had been calling me telling me the boat was in this terrible difficulty. And Sunday was the day that we had gone down to ask the Young Brothers for help. My brother and I went to the office and we spoke to—I think his name was Mr. O'Neill—and he told me he would have to call someone else, evidently the president [248] of the Company; and at that same time I met the captain of the Kolo on Sunday. And John left, I believe, Monday morning, if I recall, because this fellow in the office told John to be sure to be there around 2 o'clock, that the Kolo would be due to arrive at Molokai at that hour. It must have been Wednesday because Tuesday they had been working all day on the boat.

Q. It could not have been Thursday?

A. Well, I can't say because I——

Q. You are not definitely sure?

A. The only thing I am sure of is that I got the call the day before.

Q. What was——

The Court: Wait a minute. The day before what?

(Testimony of Pricilla North.)

The Witness: Well, I got the call the day before—let's see now; I am all confused now; let's see. It was Sunday, and then Monday I knew nothing had happened, and Tuesday. It was the day before I heard that the boat had sunk.

The Court: What day did you hear that the boat had sunk?

The Witness: Well, it was—I was very relieved that day; in fact, I was very happy. Then all of a sudden John called me up the next day and told me there wasn't anything he could do, that the boat had sunk. So it was the day before I heard the boat had sunk.

Q. (By Mr. Collins): But you are unable to fix the date [249] beyond that?

A. No, because I——

Mr. Collins: That is all.

Mr. Quinn: No further questions.

The Court: You are excused.

(Witness excused.)

The Court: Next witness.

Mr. Quinn: That is all, your Honor. That is the extent of the rebuttal for the Libellant.

The Court: Where is Mr. North?

Mr. Quinn: I don't know, your Honor. I hadn't thought of calling Mr. North. I have never talked to him about the case.

The Court: Are you going to call him?

Mr. Collins: We hadn't planned to. If it would



help your Honor in making his decision, we would be happy to do it.

The Court: I am not sure it will, but there was such a "to-do" this morning about Mr. North, and, seeing Mrs. North here, I thought perhaps Mr. North was next.

Mr. Quinn: There is nothing in evidence. There was an offer of proof, and I think the Court should strike that from his mind. If Mr. Collins wants to show some sort of an agreement between Joe and Mr. Cho, I would be happy to arrange for Mr. North to be down here, but apart from that I [250] have rested and do not intend to call him.

Mr. Collins: I don't think it is necessary to ask the Court to strike it from his mind. In the position in which it is in, it is merely an offer of proof.

The Court: Have you any rebuttal evidence?

Mr. Collins: No rebuttal evidence.

The Court: I suppose the awash sampan could have wandered off somewhere. Before you close, let me tell you I am a little bit concerned about the fact that normally a sampan wouldn't sink even if it was cut loose from the tug, and I am curious to find out why it was—assuming everything else may have been unauthorized—why somebody didn't go back and find the thing and bring it home.

Mr. Quinn: Look for the tug, your Honor?

The Court: Look for the sampan.

Mr. Quinn: The sampan, I mean. I have no idea why, except that I can add this, that everybody was told at the time in a Coast Guard hear-

ing, that is, at that moment it was represented that they had watched a sampan sink, and it was only subsequently that it was learned—and I don't know whether John Cho knew that at the outset, but it was only by talking to other people involved, to Kalani and to Abell, and then to Kahiapo again that it was brought out. In fact, it was assumed that it would probably sink by the skipper of the sampan at the time it was cut. [251]

The Court: Let me be a little bit more specific. It may not be anything either of you want to cover. It occurs to me that the evidence here does not affirmatively show that the sampan when last seen by people who testified in this case had sunk. The evidence, to my mind, presently shows that when last seen a good deal of the sampan was awash. But, as you are fond of saying, there were several feet of freeboard, which I take it is wood above the water. The evidence further tends to show that there is reason for believing that sampans awash do not sink, easily at least.

Mr. Quinn: If I may add, your Honor, the evidence also tends to show that a sampan awash could be towed back.

The Court: Yes, I think you are right on that. What I am getting at is this: When the captain of the Tug Kolo arrived here in Honolulu, the evidence shows that he that night called Young Brothers, by calling its manager, Mr. Harrison, and reported what had happened to him.

Assuming that there was up to that time no lia-

bility on Young Brothers, or no liability on the 'Tug Kolo, I am wondering if at that point there wasn't some obligation on somebody's part to go back, either with that tug or some other tug, and get that sampan and bring it in. That is a point neither of you have touched. Is there anything to it that either of you want to develop?

Mr. Quinn: Well, if your Honor please, I don't want particularly to go into it any further, because I believe we have shown a tug without a radio out there in a situation where it cuts something loose that could be saved, and that is the negligence as far as we are concerned. That is the second aspect on which we rely for our case. I can't see anything more that we can show beyond that. I think the failure to take proper steps to salvage the vessel took place at that point. I don't know whether after that there was anything Young Brothers could have done, whether, when the Kolo makes it in, whether they could then go out and look for a half submerged craft in the middle of Molokai channel.

The Court: Let me put the reverse angle to you. Having without doubt a report from his crew, was there any obligation on your Plaintiff's part to insist that either he or somebody else go back and find out what had happened to this sampan and possibly tow it in? Was there any negligence on his part for not doing something like that?

Mr. Quinn: I don't know, your Honor. Again, I don't think that, having left a half submerged craft in the middle of the channel at 3:30, having

advised Young Brothers at 9 o'clock, presumably somebody would have—John Cho would have to find the money first to engage something to go out there and would probably have to wait a minimum of about 24 hours from the time of abandonment. The question of finding something in those waters, under those circumstances, when even our air [253] searches around here often find it very difficult, is something on which I don't see how there would be any duty. He put himself in the care and custody of another who treated him rawly, and as far as I can see he could do no more.

The Court: There is still another possible angle to this same situation to which I invite your attention. Being a "land lubber" I can ask these questions. It also occurs to me that regardless of the relationship between the parties, and so forth, that leaving this sampan awash out there all by itself in the ocean would constitute, as you have labeled it throughout the trial in a different situation, a menace to navigation.

Mr. Quinn: I think it would.

The Court: Was there any obligation on anybody's part to go out and remove that menace to navigation, and if there was, could it have been done in such a way that the menace could have been removed by towing the thing back home?

Mr. Quinn: If they could have found it, I suppose so, your Honor. That would be an obligation imputed to Young Brothers by the Coast Guard, if it had been disclosed that, in fact, nobody had

seen this sampan sink. He who leaves a menace to navigation in an area has the duty to remove it.

The Court: That obligation is owed to the Government.

Mr. Quinn: Yes, your Honor. I suppose if somebody [254] had hit that, if a craft belonging, say, to Inter-Island had struck that sampan while it was there, they might well have taken a suit in admiralty against Young Brothers for having so left it. But I do not think that any of that would accrue at all to John Cho.

The Court: No, but my thought was, if somebody had that obligation and went out there to discharge it, then they could have observed that they could have removed the thing by doing one of two things: at once removing the menace or bringing the thing home.

Mr. Quinn: Saving the vessel, yes, your Honor.

The Court: I also seem to recollect, without consulting my notes, that when Joe, captain of the Kolo, telephoned Mr. Harrison that night, all he told him was that he had lost his tow. And I think I stated, when I tried to review in a summary way, that the evidence was that the sampan had been awash and cut loose. It well might be that from simply saying he had lost his tow you couldn't tell what the situation was, or there might have been an obligation to inquire as to exactly what had happened.

Anyway, those are some of the things that are going through my mind. If there isn't anything in

them that either of you wish to develop, why, I am not trying the case, but I want to know just where I am and what I have to go on. I don't want any loose ends left. [255]

Mr. Quinn: From the viewpoint of the Libellant, I don't see how we can go any further than we have, if your Honor please, in showing the negligence of Young Brothers; and, with respect to the point you have just mentioned, I think it is credible that Joe Kahiapo, the master of the Kolo, probably thought the sampan was going to plummet down to the bottom of the ocean. I think there is an indication there from Abell's testimony that he was scared, but the fact remains that is not the way a wooden ship operates.

The Court: Then the evidence is all in on both sides?

Mr. Collins: If your Honor would care for a clarification of that 'phone call, we would be happy to call Mr. Harrison to the stand.

The Court: What 'phone call?

Mr. Collins: That you are speaking of, Joe Kahiapo, that evening.

The Court: Only if there is something you wish to go into in line with what I have been talking about.

Mr. Collins: It is just along the line you have mentioned. If you feel that the question—I had not considered it at all pertinent to this case—as to any



liability arising after the sinking itself—if you consider that that is important, I would like to have the opportunity of having Mr. Harrison testify.

The Court: All right. I am not sure it will be of importance, but let's have it for what it is worth. Those witnesses who have been excluded may now come back, if they are interested, rather than standing around the door.

### EDWARD T. HARRISON

recalled as a witness on behalf of the Respondent, having been previously duly sworn, was examined and testified as follows:

#### Redirect Examination

The Court: You may sit down. You are the same Mr. Harrison who testified under oath heretofore?

The Witness: Yes.

The Court: And I remind you you are still under oath. All right, Mr. Collins, based on the Court's inquiry, you have a question you want to ask?

By Mr. Collins:

Q. Mr. Harrison, did you receive a telephone call from Joe Kahiapo on the evening of Wednesday, April 7?      A. Yes, I did.

Q. What was the substance of the conversation?

A. It was about nine o'clock at night; Joe telephoned and said that the sampan had sunk in the

(Testimony of Edward T. Harrison.)

channel, and I told him I would take it up with him in the morning. That was the entire conversation.

Q. Did he use the word "sank" and not "lost"?

A. Well, I am almost positive that that is correct. [257]

Q. That is your best recollection?

A. That is correct.

Q. And there was no further conversation on that? A. No.

The Court: All right.

Mr. Quinn: No questions.

The Court: Thank you.

(Witness excused.)

Mr. Quinn: May I clarify a point, your Honor?

The Court: Yes.

Mr. Quinn: Early in the trial I made an objection to a line of questioning about the authority of the master of the tug Kolo as being immaterial. Your Honor overruled my objection and said: "Your objection may go to that line of questioning." Perhaps it was an oversight on my part, but I more or less thought that would continue to the line of questioning of any witness dealing with the authority.

The Court: Well, I have no objection to the record's now so showing.

Mr. Collins: I have no objection, your Honor.

Mr. Quinn: I had more or less in the back of my mind assumed that should have been done, but I should have taken it up.

The Court: Let the record show that objection went to that line regardless of who was expressing it. [258]

Mr. Quinn: Yes.

The Court: Are you prepared to argue the case this afternoon?

Mr. Collins: My suggestion would be, your Honor, if I might be so bold, that I think, because this admiralty is a matter on which I am sure Mr. Quinn will admit he is no experienced practitioner, and I also must admit to being in the same position, it might be helpful to the Court if memoranda were submitted to you, particularly on the points on which we are so strongly at variance. And upon submission of that memoranda, I think then a summing up of the evidence might become more valuable.

The Court: How do you feel about it?

Mr. Quinn: Well, frankly, if the Court please, I have no serious objection to that, except that I would like to be in a position where I didn't have to order a transcript at the expense of my client in order later to prepare a summation of the evidence. That is the first point, and the second point is: I am still at a loss to find what Mr. Collins is driving at in the face of the definitely and deeply established principle in the law of admiralty with respect to proceedings in rem, a question of authority *vel non* of a person in rightful possession of that vessel. I would be prepared to state that right now. I think it is so firmly established in the

law that any search would be into the intricacies of strange and esoteric principles rather than the warp and woof of the law of admiralty.

The Court: Perhaps I might be able to simplify the task of both of you by pointing out what seems to me to be the situation.

I have rather detailed notes, and I don't think it necessary for either of you to order transcripts in order to summarize, for with your notes and mine, I am sure we can get pretty close to the facts. In fact, I *would prepared* to state what the facts are now. And there isn't any great dispute in the factual area as I see it.

Without indicating that these are the final findings of fact, but simply as a brief outline of the way the thing looks to me at the moment, and without binding the Court as to the applicability of the law of Admiralty, but just on general principles, I can not see with any clarity, at least from these facts and the evidence presented here, where it could possibly be contended by anybody, and I don't think it is, that the towage of this *Tenyo Maru* from the pier at Kaunakakai after it was removed from the reef to Honolulu, or in that direction, by the Tug Kolo was authorized by Young Brothers.

Now, whether or not, despite the lack of authorization to the captain of that tug boat, Joe, Joe, nevertheless, as tug boat captain, had ostensible or apparent authority, to borrow a phrase from the law of agency, to go ahead and do it [260] anyway, and that possibly, therefore, he having done it, Young

Brothers might be liable, I don't know. But Young Brothers isn't being sued. It is the tug itself that is being sued. Maybe Joe, as captain, had the authority nevertheless, regardless of his relationship to Young Brothers, his employer; that the relationship to the tug, I say, could bind it, I don't know. But I am reasonably well satisfied that this was a venture on Joe's part with his tug and that Young Brothers had not authorized it or made any contractual arrangements for it.

I am further fairly well satisfied that, taking into consideration wind and weather, both Joe and the Plaintiff either knew, or should have known, that grave risks were involved in towing that sampan in its then condition from Kaunakakai to Honolulu. And I am mindful of the testimony of Captain Ho, as amended by Mr. Collins' questions to him, that finally came to this: that if patched, at Kaunakakai, then, in his opinion, the Tug Kolo could have towed the Tenyo Maru to Honolulu. The fact is it was not patched. The Plaintiff knew it and Joe, the captain of the Kolo, knew it.

Now, in the law of admiralty is there any rule that would make negligence and contributory negligence offset one another?

Mr. Quinn: If I may be heard, your Honor, there is a considerable and well established line of authority on this very question, on taking an unseaworthy craft in tow. And the cases start with a very local case in the Federal Courts of the [261]



Steam-Tug William Murtaugh, 3 Federal 404; (1880).

The Court: Are there any modern cases on this?

Mr. Quinn: This is the leading case, your Honor, and every case thereafter refers to it.

The Court: That page again on Murtaugh?

Mr. Quinn: 3 Federal 404. The law of admiralty in this connection, your Honor, has not changed. I have the leading cases on the subject, and there is an extensive annotation in 54 ALR 101. But the general ruling, getting back to the Court's question, is that when a tug takes a tow which was unseaworthy and which the tug owner knew, or should have known, was unseaworthy, and during the course of the towage the tow is lost, by virtue of that weakness, then, the tug is liable. Now, it is further held that when the tow owner knew, or should have known——

The Court: (Interrupting) ——Also.

Mr. Quinn: (Continuing) ——that it was unseaworthy, that then the tow owner is also negligent; and, pursuant to the general well founded rules of admiralty, the damages will then be split.

The Court: Between the——

Mr. Quinn: Between the tug owner, or the tug, and the tow owner. And these cases all hold, if those are the findings, that the owner of the tow is entitled to one half his damage. [262]

The Court: Well, just briefly, I would like both of you to consider that rather seriously, for, off-hand, it looks to me as if that might well be the situation here.



Mr. Quinn: Well, I had certainly had that situation in mind, your Honor, but I think there are other things that ought to be taken into consideration, which your Honor has previously pointed out, and that is whether or not there were adequate and proper steps taken to salvage this vessel when it was awash.

The Court: Well, how can you go into that now? It is not part of your pleadings.

Mr. Quinn: It is part of my pleadings, your Honor.

The Court: Oh, it is?

Mr. Quinn: Yes, your Honor.

The Court: I haven't been conscious of that.

Mr. Quinn: If it is not stated expressly enough for the Court, I would strongly ask for right to amend under the rules of admiralty, which I think would give me that right at any time. But I believe it is clearly stated in Paragraph Seventh, subparagraph (3) "In failing to take proper action when advised that the vessel was taking more water than she could pump; (4) In other faults to be shown at the trial of the action." I believe that is all I need to show they didn't salvage it properly. If it was too broad, Mr. Collins would have had a right to except and force a more particular statement. [263] I have alleged taking an unseaworthy tow, towing the leaking vessel through the waters of the channel and failing to take proper action when advised that the vessel was taking more water than she could pump.

Now, it is true that there are facts that have come out during the course of the trial, and if the Court finds this is too broad an allegation, I would now request the right to amend to make the pleadings conform to the proof as having been presented to the Court.

The Court: Your whole theory is based on a proposition of law which I haven't yet examined, but I gather from your remarks during the trial that irrespective of Young Brothers and the authority it may or may not have granted to its tug captain or allowed the tug captain to display, even though unauthorized, that you, in point of law, believe Young Brothers can be eliminated from the picture entirely, as they are not in the picture you drew in your pleadings, and we look solely to the barge.

Mr. Quinn: Yes, sir.

The Court: Or the tug.

Mr. Quinn: Yes, sir.

The Court: Whereas Mr. Collins, if I understand his position correctly, undertakes the defense by running his line in such a way that he is trying, perhaps has successfully shown that this was wholly unauthorized and that Young [264] Brothers is not liable; but he doesn't seem to me to get to the point of meeting you on your tug issue.

Mr. Quinn: I might point out that Mr. Collins would be entirely correct, if we had brought a suit in personam, that there is no doubt, if it were unauthorized, we would be barred. In fact this is a suit in rem.

True, Young Brothers came in as a claimant, but the liability tried is the liability of the Kolo.

The leading case on that is *The China*, which is an old case; but you will find the admiralty cases are largely old ones. *The China*, 7 Wall 53; 17 Law. Ed. 67. I am sorry, your Honor, 1868. And that was the case where the American authorities first split from the English authorities on this question; and that was the case of compulsory pilotage where the vessel was required by law to take a pilot and had no choice, could not direct his actions; the pilot was negligent, and the question before the Court was: Could the vessel be held liable under those circumstances? Held, so long as the person is in lawful possession of the vessel, he may render the vessel liable.

There is an article in 19 Harv. L. R. 445, *Respondeat Superior in Admiralty*,—I take it that is exactly what Mr. Collins is relying on, that there can be no *respondeat superior* in this case.—which is quoted in *Robinson on Admiralty*, page 365, that “liability in rem has no connection with the law of [265] master and servant, or with the maxim *respondeat superior*.”

It has then been carried that a charterer, if the Court please, having no authority whatsoever from the owner to do anything except under contract, handling his own operations, which might be one single trip or voyage from Honolulu to Hilo to carry certain goods and back and turn the vessel over—en route the captain selected by the charterer

has a collision; the vessel is held. It so frequently appears in numerous connections in the law of admiralty that when you have a suit in rem the only question is whether or not the person in possession was in lawful possession. They will not extend it so far as to hold the vessel when a thief is in possession and is negligent, but anything less than a thief can render the vessel liable in negligence.

In *The China* the Court is reported—and I did not bring my brief of *The China* and other cases with me, but the Court, it is said, denied the *China's* contention that the matter rested upon the general legal principles that one shall not be liable for the torts of another person which is imposed upon him by law and is therefore not his servant or agent. A decree for the Libellant is affirmed. The owner's vessel is always a pledge to any person with whom the ship's possessor has such dealings that a cause of action against the ship would arise. Now, there are numerous cases which will follow that under receiverships, charters and cases of an authorized master. An authorized master is perhaps one that wouldn't even follow within the doctrine, since a master would probably have apparent authority at all times. But that, I think is very clear, and it is on that doctrine that we rest our belief that the authority given by Young Brothers to Joe Kahiapo has no materiality in this case.

The Court: I repeat, and I think perhaps Mr. Collins will agree with me when I ask him in a moment, that it strikes me that both of you are trying

this case on entirely different theories, and that is the big thing that will have to be decided.

I think it might be helpful to have all of us examine these questions. I will let you outline your theory of the case, Mr. Collins, in a moment, but before you do, for the guidance of both of you, these strike me as being the facts which may well ultimately be found. I want to leave it open. I don't want to bind myself too closely here, but it strikes me that the pulling of the Tenyo Maru off the reef at Kaunakakai was authorized, and on that phase of it, it is completely out of our operative actions. We don't have to bother with that, so that our situation becomes important at the time that the sampan was pulled off that reef. And we know as a fact that it was taken into the harbor at Kaunakakai. Let us pass over the question as to whether or not that was the right place to take it, or whether it was a safe harbor, or whether the salvage [267] operation was then concluded. The fact of the matter is that that sampan was tied up at the pier at Kaunakakai, and it was leaking and leaking so badly that they had to use a gas pump to keep the thing afloat; and, without any repairs being made to it, the next day, without authority, the captain of the tug boat Kolo undertook to tow that sampan in that condition to Honolulu; and the owner of that sampan, who was then and there present at that pier at Kaunakakai when his sampan was taken in tow, as I have just described, also knew that the sampan was leaking badly and in



need of continual pumping; and I feel that he either knew or should have known everything about that situation that the captain of the Kolo either knew or should have known. And we find further from the facts that when that tug got that sampan out in the channel, due to some circumstances that none of us know anything about, whether it was wind and waves, or inexperience of the crew aboard the sampan, failure of the pump, or a combination of circumstances, or whatever it was, we find that that sampan became awash. And I am satisfied in my own mind that the captain of the tug Kolo became scared and excited and perhaps in too great haste cut loose the tow and picked up the crew and left the awash sampan adrift, and returned to Honolulu.

I repeat myself briefly. Those to me are the principal facts upon which we are going to have to decide this case. They are not the final facts that I may find, but for the help [268] and guidance of you gentlemen in arguing your case, I think I should, in fairness, point out my view of the thing as I sit here and listen to it.

Now, Mr. Collins, is there anything you would like to say in having heard Brother Quinn outline his theory of the case?

Mr. Collins: I think your Honor is familiar with our theory, but I don't think it can be brushed aside as clearly as Mr. Quinn indicates. As I say, this is a matter I would like to furnish a brief for.

Briefly, we have been relying in our position on



certain cases that have involved tows, involved tug boats taking tows where the captain of the tug boat was without authority to take the tow; and those cases are where it was clearly beyond the authority of the captain and was known by the owner of the tow to be beyond the authority of the captain of the tug. In those cases the libel has been dismissed. Those cases that come to my mind immediately are the cases of *The Andrew J. White*, 108 Fed. 685, where the Court found there was a wrongful assumption of authority by the master of the tug in taking on the tow——

The Court: Incidentally, I am not sure I stated that, but I am satisfied that the captain of the *Kolo* had no express authority to take on that tow. Have I stated that?

Mr. Quinn: I think you did, your Honor. There is no finding as to knowledge or lack thereof on the part of [269] John Cho with respect to authority that was represented to him.

The Court: No, I haven't covered that.

Mr. Collins: There is the case of *The R. F. Cahill*, a rather early Federal case; Federal Cases No. 11,735, in 1878, where there was again a libel, which involved a towage contract between New York and South Amboy to Fifty-first Street, and after they got up to that point, the owner of the tow asked the owner of the tug to carry him to further point. The owner of the tow knew that the owner of the tug didn't have the authority to do it, and the owner of the tug knew he didn't have the authority to do

it. They took it upon themselves to go up that additional four or five blocks, and the damage occurred in that extra run. The libel was dismissed.

There was a further case, *The Oceanica*, 144 Fed. 301. Now, in that case it involved a towage contract with barges up around Buffalo, New York, and the arrangement was that the tow was to be between two spots. Again there was the same situation. The tug master and the owner of the tow got together and agreed it should go beyond that. The lower court permitted the Libellant to recover. On appeal that was reversed and certiorari was denied by the Supreme Court.

So we are not at all satisfied Mr. Quinn's cases are correct. Those are the only cases I have been able to find that involved the question of authority. In each of those cases there has been a dismissal of the libel, on the basis that [270] the master of the tug was acting without authority and the owner of the tow knew it.

The Court: All those were libels of the tug?

Mr. Collins: All those were libels of the tug.

The Court: In rem?

Mr. Collins: Yes, sir.

The Court: Well, I still wish there were a modern case.

Mr. Collins: This is a crucial point, and we are perfectly happy to submit briefs to explore all of the possibilities on it.

The Court: I will take it under advisement, and you gentlemen can either give me a list of the cases

you want me to read or give me a short memorandum. It doesn't have to be exhaustive. After I have digested those, if you would like to come back and argue your cases, I would be glad to give you time. By that time I hope to have prepared the final findings of fact, and if I have them prepared sufficiently in advance, I will give you copies of them for your guidance in arguing.

How does that strike you?

Mr. Quinn: That is satisfactory to me, your Honor.

Mr. Collins: Shall we set any tentative date for the memoranda to be submitted to you?

The Court: Yes. What would you like?

Mr. Collins: I would suggest a week at the outside. [271]

Mr. Quinn: Ten days, if the Court please. I have another case coming up that is going to take some time.

Mr. Collins: That would be agreeable to me.

The Court: In other words, the same ten days for both of you to provide the Court with memos and to exchange. I don't see any need of counters.

Mr. Collins: I assume you do not wish us to go into the question of splitting liability as proposed by Mr. Quinn, to which we have no argument if negligence is found on the part of both, that the damages will be split equally.

The Court: You do not need to go into it, but I would like you to give me a few references that express that principle of admiralty law.

Mr. Quinn: If I can work out some way that Mr. Cho can be entitled to more than 50 per cent, I don't want to be foreclosed from making that assertion. In other words, if the Court should find that the negligence on the part of the tug owner exceeded that of the tow owner, I take it this Court could give an increased percentage to the tow owner. But, at any rate, we will brief that question and act accordingly.

The Court: That is a principle that is foreign to me and is peculiar to the law of admiralty, apparently; so if we ever reach that, I will hear you fully on it, but, in the meantime, in your memos you can just touch on it by way of giving me cases you would like me to read to familiarize myself to the extent of the principle and its application.

All right, ten days from today for the memos.

Mr. Quinn: Very well, your Honor.

The Court: What would that be, Mr. Clerk? Supposing, rather than a strict ten days, that you have your memo filed by May 9, which I think is twelve days, but there is a Sunday or two in there.

Mr. Clerk, what is my schedule? Do we have anything on the 12th or 13th?

The Clerk: No, your Honor, not the 12th or 13th. You set the case this morning for the 16th.

The Court: The 12th is clear?

The Clerk: Yes.

The Court: Supposing you plan to come in and argue the matter briefly on May 12.

Mr. Quinn: Very well, your Honor.

Mr. Collins: That is satisfactory, your Honor.

The Court: All right, ten o'clock for the argument—or nine; which do you prefer?

Mr. Collins: I would prefer nine o'clock, your Honor. General principles.

Mr. Quinn: That is very satisfactory, provided it is satisfactory with the Court.

The Court: And if, on checking with your office calendars, you find that that is not a good date, arrange [273] among yourselves and with the Clerk, but unless I hear from you, it will be the 12th at nine for argument.

(Thereupon, at 2:35 p.m., April 26, 1949, hearing in the above-entitled matter was adjourned.) [274]

May 23, 1949

The Clerk: Admiralty No. 409, John Cho vs. The Tug Kolo.

The Court: I understand you wish to make a motion to reopen, Mr. Collins?

Mr. Collins: Yes, we do, your Honor, to present some further evidence on the question of the buoyancy of sampans and the general problem of sinkings.

The Court: Have you any objection to the motion's being granted?

Mr. Quinn: Yes, I have, your Honor, unless there is some showing made. Certainly I am fully aware that this matter is one that lies within the Court's discretion, but that, of course, is a con-

trolled discretion; and in the absence of some showing that Mr. Collins in some way was precluded from putting this evidence on at the time of the trial, I think it is asking too much to reopen at this stage. The briefs have been filed and the oral argument has been had on the case. It seems an undue imposition on the Court and, I think, on my client and myself to reopen on questions which were fully explored at the time of the trial, and on which Mr. Collins had every opportunity to put on whatever evidence he saw fit.

The Court: Well, let us review the matter briefly since the submission of the arguments—Let me go back a bit [275] further. During the course of argument I ventured a statement of certain facts in my own personal experience with respect to boats of much smaller size on fresh water. Subsequent to the argument Mr. Collins came to see me and said he was quite concerned about my experience in that respect, and also that it had led him—if I can recall the substance of his comment—to think it might be advisable to put in additional testimony on the floatability of sampans. And I asked him if he had consulted you and he said he had not as yet. I told him to do so; if there was agreement on the thing and you wanted to reopen, I would be willing to do so. Isn't that the substance?

Mr. Collins: That is the substance.

The Court: So here we are. I thought you gentlemen had been in agreement.



Mr. Quinn: Well, perhaps my own interpretation of my subsequent conversation with Mr. Collins was in error. Mr. Collins told me the Court had granted him the right to reopen, in the light of which I said "all right"; but I was prepared to ask this morning why there had not been a motion to reopen and an opportunity for me to be heard. If this is the motion and if I can be heard, I will state, as I have just stated, I came into court thinking there was an agreement. Apparently there wasn't. Perhaps in the light of that Mr. Collins might wish to amplify the ground of the motion. There has been some misunderstanding somewhere. [276]

Mr. Collins: There apparently is, and I am very sorry. It was my intention to convey to Mr. Quinn the idea that if it was agreeable to him, you had expressed your agreement to go ahead with it, following the suggestion of the Court.

The reason why we felt it would be desirable to amplify in this connection was, as I had stated, I can see there might have been some pre-notions on your part that we wished to dispel; and because there did not seem to be a sufficient clarity of proof in the matter of the sampans and the general seaworthy condition and the buoyancy, or whatever the technical terms might be, to be of assistance to the Court in arriving at its decision, we thought it well that this matter be brought further. It is on this basis that we ask at this time that we be permitted to do so.

Mr. Quinn: Well, it is true, your Honor, that the Tug Kolo and Young Brothers and Mr. Collins didn't see fit at the time to put on any evidence with respect to the buoyancy, but they heard our testimony. It was there. It was presented before them. And if they saw fit to undertake to disprove it or to rebut it, there is no showing that they had no opportunity to do it at that time. Instead, they submitted their case, I suppose on the theory on which they had proceeded from the outset, that is, that it was immaterial.

The Court: Apparently, based on that comment of mine during the course of argument, which I won't repeat—I [277] think you will remember also.

Mr. Quinn: Yes, I do, your Honor.

The Court: I think that caused Mr. Collins to become more concerned on the point than previously, and that is the motivating cause for coming on with this motion now.

Mr. Quinn: Your Honor, I think it is possible that before then Mr. Collins had assigned absolutely no weight to the testimony we had put on, but I don't think that the Court indicated it was going to take judicial notice of the fact that sampans would never sink.

The Court: No. I have also told Mr. Collins that my own personal experience on fresh water has nothing to do with this case. It just happened to be a reminiscent thing that occurred to me as you all were arguing. But, on the other hand, on this question of whether or not sampans awash can

remain afloat for a period of time there is an issue on which the Court certainly wants the best help from both of you that it can get.

In reviewing what is presently before the Court, regardless of the source from which it comes, I agree with you that Mr. Collins offered none. You offered the experience of a sampan owner, who very religiously refused to budge beyond his own experience. He said that all he knows was that his sampan, with its front part cut off, didn't sink and was able to be towed from Barbers Point to Kewalo Basin. [278]

Then you had the man from Child Marine, and, without reviewing my notes recently, my recollection is that the most he said was, not that sampans wouldn't sink, but they did have great powers of remaining afloat, even though they were awash. Am I wrong?

Mr. Quinn: Yes, your Honor, I believe you are. I think he went so much further as to say, not that they couldn't sink, but as a rule they would not, at least a sampan as described as this one here. And there is the further fact that the other sampan owner did testify that his sampan was almost exactly like the one in question here, so that adds to his individual experience.

The Court: Well, that rephrasing of his testimony doesn't jar me. I will review it here in a moment. I wanted also to mention there was still one other person, namely, the little Filipino aboard the tug who suggested to the tug captain that he shouldn't cut the—what-do-you-call-it?—winch?

Mr. Quinn: The hawser.

The Court (Continuing): —for it would remain afloat. But of those three sources of information the only one that strikes me as being particularly reliable would be the testimony of that man from Child Marine. What was his name?

Mr. Quinn: Leary. Robert Leary.

The Court: While I am looking for this in my notes, [279] Mr. Collins, would you like to explain why during the course of the trial you didn't put on any testimony of this sort at all.

Mr. Collins: If your Honor please, the position in which the Libellee found itself was that at the conclusion of the first day's testimony, the only evidence that we had had was the evidence of the owner of the sampan on the towage from Barbers Point to Kewalo Basin. As far as the testimony that had been made on the tug was concerned, it was my recollection that it was stricken; he was not an expert. As a consequence, on the second morning when the evidence was introduced, that was really the first time we had any expert testimony attempting to go into the question of buoyancy of sampans and the possibility of their sinking.

The Court: Child Marine man Leary?

Mr. Collins: Yes, your Honor. At that time it was the feeling of the Libellee that as the evidence then stood there had been no proof, adequate, proof, made by the Libellant, and the cumulative effect of that evidence, together with the subsequent state-

ment that the Court made, put the Libellee in a position where he felt that affirmative evidence would have to be introduced by him in order to clarify the situation and also because the matter at that time, standing on the testimony alone, was in a confused condition.

The Court: In a nutshell, my comment during the [280] course of the argument bothered you then and bothers you now?

Mr. Collins: It did then, yes, sir; it does now, yes, your Honor.

The Court: Even though you can agree with me that when I tell you that it would have no effect on the decision, should I agree with Brother Quinn, you will never believe it didn't?

Mr. Collins: I would hesitate to say that, your Honor, but I think experiences of that nature are bound to influence the analysis that is made of the testimony even though a conscious attempt be made not have it influence it.

The Court: I have Leary's testimony reviewed here. In substance, he said a sampan awash does not normally sink, and they remain awash regardless of the sea; the waves do not bother—on direct examination. And on cross-examination: Sampans don't normally sink; they remain awash.

Mr. Quinn: Your Honor, it seems to me pretty unusual that Mr. Collins would assert the Court as putting a lesser burden of proof on the Libellant because of a statement about canoes or small boats on fresh water lakes. The only solution there,



as far as I can see, is not to make believe now to put on evidence because of that statement, despite the Court's obvious freedom from any preconceived notion with respect to sampans—if there is a preconceived notion, Mr. Collins' remedy or suggestion is obvious; but there is not. It is just to beg [281] leave to accumulate more evidence which he didn't see fit to put in the first time, merely because the Court has commented on how canoes float.

The Court: Flat bottom boat.

Mr. Quinn: Flat bottom boat with logs in it.

The Court: Well, on the other hand, I am concerned that what I said bothered him then and bothers him now, and I don't want any doubt remaining in this picture. If this subject is one of expertness, what danger to you can there be if another expert gives his opinion?

Mr. Quinn: There is no danger, your Honor, except the usual danger of conflict of experts. If there is further testimony, I shall have to beg leave for rebuttal testimony on the same subject. In the meantime, the whole matter has—we thought—been finally concluded, with briefs, oral argument and everything over, merely awaiting the determination of the Court, and to reopen on that question now——

The Court: Let me interrupt. If you thought I had granted the motion to reopen, why didn't you come prepared today with additional expert testimony?



Mr. Quinn: I told Mr. Cho that we would have our experts ready. He has the names of them, and if it is necessary to go into it further, we will; but I was going to make some statement here, even if the Court had granted the motion, and I wanted the record to show that I didn't think it was [282] proper that it should have been granted without my having been heard on the matter.

The Court: Well, I am not sure that you haven't got the better of the argument on a technical point, but because I, too, am disturbed that Mr. Collins is disturbed over a remark I made during the course of argument, I am going to let him reopen to introduce testimony on this point, and this point alone. And you can have all the time you want to give me additional testimony on the point, if you wish to. I do hope we can have it in the next day or two so we can clean this matter up, but I don't want anybody leaving this court room, based on any side remark of mine, thinking, "Sure, he says he won't consider that, but it is humanly impossible not to, and we didn't have a fair chance to correct the situation." So, I think, by interjecting a personal experience of mine into the thing during the course of argument, that I would feel better if you both have an opportunity to give me anything else on this subject that you want, because what I want are all the facts from which I can draw proper conclusions. I don't want anybody leaving the court room under any misapprehension as to where I get my facts.

Do you think that is fair enough?

Mr. Quinn: Well, your Honor, I will certainly abide by the Court's ruling, but, in usual Irish fashion, trying to get the last word, if it took Young Brothers three weeks to find an expert that would so testify, I think it would be very [283] prejudicial to the Libellant that they be allowed to bring him in, but I will certainly abide by the Court's ruling.

The Court: I think I will open it up for both of you. I will feel better about it.

Mr. Collins: Mr. Holm.

### CARL HOLM

called as a witness on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

The Clerk: Just sit down, please.

The Court: Please state your name, age, residence, occupation and citizenship.

The Witness: Carl Holm, vice president of Hawaiian Tuna Packers, 4989 Kalaniana'ole Highway. American naturalized citizen.

The Court: You are an American citizen whether you acquired that status by naturalization or by birth.

The Witness: That's right.

The Court: So, you do realize you don't have to advertise the fact that you are naturalized? I appreciate your frankness.

The Witness: I don't know that.

(Testimony of Carl Holm.)

The Court: You are an American citizen. That is all you have to say. And you are such exclusively? Only?

The Witness: I appreciate that, your Honor.

The Court: And there is just one thing you didn't [284] tell me, your age.

The Witness: Forty-six.

The Court: Take the witness.

### Direct Examination

By Mr. Collins:

Q. Mr. Holm, what is your present occupation?

A. I am vice president in charge of production, Hawaiian Tuna Packers.

Q. What is the nature of the work you perform at Tuna Packers?

A. In addition to that, manager of the Hawaiian shipyards in connection with Hawaiian Tuna Packers.

Q. Does your work bring you in contact with sampans?      A. Yes, to a great extent.

Q. What was your occupation before becoming affiliated with Tuna Packers?

A. Immediately before that?

Q. Yes.      A. Naval officer.

Q. And what were your duties as a naval officer?

A. Beginning of the war as consultant and salvage. Design of salvage matter to the Bureau.

The Court: Assigned?

The Witness: Designed—of salvage.

(Testimony of Carl Holm.)

The Court: Designed? [285]

The Witness: Yes.

A. (Continuing): In the latter part of the war in charge of salvage and rescue and towing in forward area.

Q. Will you explain to the Court what some of your duties were in your assignments in salvage and rescue work?

A. I was in charge of Task Group 51.6, and all the duties in connection therewith was that of towing and rescuing ships in distress in forward area.

Q. Did you have an occasion to train any men on towage work during that period?

A. Young officers that were sent out from the States had to be trained and instructed in salvage and towing, yes.

Q. Did you, in the course of your assignment with the Navy, have any occasion to write any articles or material on towage work?

A. I wrote for the salvage school in New York, articles——

Q. Have you had any published articles besides those?

A. Published under the name of the Bureau of Ships, yes.

The Court: That is the Navy?

The Witness: Navy, yes.

Q. (By Mr. Collins): What was your occupation prior to going into the Navy?

(Testimony of Carl Holm.)

A. I was president of the United States Marine Salvage Company in Florida. [286]

The Court: Florida?

The Witness: Florida.

Q. (By Mr. Collins): How many years would you say you had been in salvage work?

A. I was trained in salvage work in the Royal Danish Navy, and started the United States Marine Salvage Company in 1927, I believe it was, and continued that corporation until 1936 or '37, when I went into the Bureau of Ships in '34—no, 1940, it was, as civilian, and under contract to the chief of the Bureau of Ships.

The Court: Training in salvage work began in the English Navy?

The Witness: Danish.

The Court: Danish?

The Witness: Danish, your Honor.

Q. (By Mr. Collins): Mr. Holm, I show you Libellant's Exhibit No. 1 and ask you to read the portions of it dealing with the characteristics of the Tenyo Maru.

Mr. Quinn: If the Court please, before Mr. Holm is offered as an expert on this matter, I wonder if I might cross-examine him on his qualifications?

The Court: You may.

The Witness: Yes.

The Court: Mr. Quinn has some questions of a general nature. [287]

(Testimony of Carl Holm.)

The Witness: All right.

### Voir Dire Examination

By Mr. Quinn:

Q. Mr. Holm, during your experience with Task Group 51.6 and elsewhere with the Bureau of Ships, did you have any experiences with wooden ships?

A. Landing craft, yes, a major portion of the salvage vessels with wood hulls.

Q. With wooden hulls?

A. Wooden hulls. I wouldn't say the major part, but I think 30 or 40 of the ships we had with wood hulls.

Q. Were there any in similar design to sampans that you had experience with during that period?

A. No.

Q. United States Marine Salvage was operated in Florida, was it?

A. Yes.

Q. Did you have any experience with sampans in Florida?

A. None, no.

Q. Is a sampan a particular design of wooden craft?

A. It is in respect to the sponson only, and perhaps cleaner lines.

Q. The sponsons don't appear on the normal wooden ship; is that right?

A. That is right. [288]

The Court: What are they again? I have heard about sponsons in this case, and I think I know what they are, but will you tell me what they are?



(Testimony of Carl Holm.)

The Witness: Well, having designed sampans for Hawaiian Tuna Packers, we feel in general they are useless for any other purpose but that of keeping people's feet dry a little longer than ordinarily. They are not, as people in general think, buoyancy chambers. They are, in general, covered with loose boards that are simply covers over lockers within the sponsons. They do assist in keeping spray, in keeping breaking seas from entering into the deck as a result of their protrusion from the hull in the section of the ship.

Q. (By Mr. Quinn): Are they solid or hollow?

The Court: Solid or hollow?

The Witness: They are simply a box built out from the side of the ship. They are not a buoyancy chamber.

Q. (By Mr. Quinn): When you say they are not a buoyancy chamber, do you mean they are not water-tight boxes?

A. They are water-tight as far as spray is concerned, but they are not a closed chamber which would act as a buoyancy chamber in case of sinking.

Q. You mean if they rested on the water, the water would go right in them and sink them?

A. That is right, in general, unless there is some special design in question. In general they are simply a box [289] extending from the side of the ship and secured to the side of the ship, and boxes built within the sponsons has lockers for vegetables and what-have-you.

(Testimony of Carl Holm.)

Q. You say you design sampans?

A. Yes.

Q. While you were with Tuna Packers?

A. Yes.

Q. Is it all a standard design, or are there variations within the class?

A. The latest one we launched, Sooty-Tern, 85-foot sampan—I might clarify this and the Court's question relating to sponsons. Sponsons are used on canoes also, but as closed buoyancy chambers. In other words, they are not at any time open and they will act as reserve buoyance in case the ship is filled with water.

Q. They open from the inside?

A. Not the canoe sponson.

Q. The sampan?

A. They open from the deck level.

Q. They open from the deck level?

A. Yes.

Q. And is that where you postulate that the water would enter?

A. Yes. It perhaps wouldn't enter from the outside of the hull if the sponsons are not damaged, but it would enter if [290] the sampan is deck to and rolling and see-sawing, slushing over.

Q. In other words, if the ship sank, the sponsons would fill?

A. I am there again referring to the general design. I don't know that the one in question had any special buoyancy chambers.

(Testimony of Carl Holm.)

Mr. Quinn: I have no further questions.

The Court: All right.

Direct Examination

(Continued)

By Mr. Collins:

Q. You have read the exhibit, Mr. Holm?

A. Yes, sir.

Q. Assuming that you had a sampan of those characteristics that had been on a reef from Saturday until the following Tuesday afternoon, two tugs were required to tow her off, a hole in the hull was discovered below the water line of approximately three inches wide and a foot and a half long, that her entire hull was not inspected or sounded after being taken from the reef, assuming that a pump operated continuously from six o'clock at night until the following morning to pump out the water, a bridle had been put under her to keep her afloat while at the pier, assuming there was no patch over the hull, she was towed for some four hours into the channel between Molokai and Oahu, assuming the channel was of average roughness, the [291] wind a bit brisker than average, assuming the fuel tanks were about half full, that she had no load, in a period of approximately half an hour she settled from a roughly normal position to one where her decks were awash, all compartments were flooded and only the deckhouse and four or five feet of the bow were above water, in your opinion would such a sampan sink?

(Testimony of Carl Holm.)

A. I would have to answer that question with "I don't know."

Q. What would you require in order to give an opinion as to whether the sampan would or would not sink?

A. In order to answer that question I would say that two factors would be required, that of the buoyancy left in the wood and that of the weight involved within the sampan.

Q. As far as the buoyancy of the wood is concerned, is that observable from observation?

A. No, that could only be determined by lengthy tests. I would say the older the sampan or any wood hull gets, the more water logged, of course, the wood becomes, and the factor becomes lower and lower within the wood itself, inherent in the wood.

Q. Is it possible that the buoyancy of the wood in this particular ship could be sufficiently low so that she would sink?

A. I am sorry. I didn't get that.

Q. Is it possible that the buoyancy of the wood in this [292] particular ship could be so low that she would sink?

A. It is possible.

The Court: Just a minute.

Mr. Quinn: I object to the question, your Honor. The expert hasn't been given the information to respond to that question as to the condition of the wood. The Court will recall there was a major overhaul in 1944 and upkeep every two months or so from 1946 to the time of sinking.

(Testimony of Carl Holm.)

The Court: I think the objection is well taken.

Q. (By Mr. Collins): Assuming that this sampan had had a major overhaul in 1944, that she had been kept up during the intervening period, is it still possible that the buoyancy of the wood could be sufficiently low so that this vessel could sink?

A. It is possible, yes. However, there again it depends on the weight factors involved.

The Court: By that you mean the weight of the load the ship was carrying?

The Witness: Its engines and its piping, its auxiliaries and rudder and propeller and skeg and shaft and many other things, your Honor.

The Court: Including its cargo, if any?

The Witness: Cargo, if any; that is, if the cargo is of negative buoyancy, such as iron, for instance and such as—well, anything of negative buoyancy, anything that wouldn't [293] float would, of course, add to the weight in the ship and would sink it sooner than if there was no cargo.

The Court: Well, I think Mr. Collins might also have told you in his hypothetical question that it didn't have cargo. I think all it had was its usual equipment and two or three people in the boat.

Mr. Collins: That is correct, your Honor.

Q. (By Mr. Collins): With the facts that have been given to you, in your opinion could a sampan in this condition be towed to Honolulu and safely beached at the nearest point of land, assuming it to be some eight or ten miles away?

(Testimony of Carl Holm.)

Mr. Quinn: If the Court please——

The Witness: What again——

Mr. Quinn: There is nothing in evidence that the nearest point of land was eight or ten miles away, to the best of my knowledge. I am asking; I don't recall.

The Court: That didn't sound familiar to me either. What do you have in mind? Eight or ten miles from where?

Mr. Collins: The nearest point, as I understood it, was at the point in Molokai. She was in the channel headed toward Honolulu; she had been out four hours.

The Court: You are visualizing that it might have gone back to Molokai?

Mr. Collins: The question is whether she could have stayed afloat sufficiently long either to be towed to Molokai [294] and beached there or towed to Honolulu and beached at the Island of Oahu.

The Court: Will you restate that question; I am confused.

Q. (By Mr. Collins): Assuming the facts that have been given to you, in your opinion could this sampan have been towed to Honolulu or safely beached at the nearest point of land, assuming the same to be eight or ten miles away?

The Court: I don't like that question. I am going to object to it. I think you have two questions. The first is, Could it have been towed to Honolulu?—meaning from Kaunakakai; isn't that the point?



(Testimony of Carl Holm.)

Mr. Collins: Well, it was out of Kaunakakai.

The Court: Well, I don't think you make it clear to the witness at what point and in what condition you are picking up this ship and looking at it and asking the question. Are you assuming it to be in a certain position and in a certain condition when you ask that question?

Mr. Collins: We are assuming it to be in the condition in which it has been previously described.

The Court: Well, that is in the Molokai Channel, awash, with just a little bit above the water?

Mr. Collins: Yes, your Honor.

The Court: All right. Now your question, now that I have that straight: Could it at that point, in that condition, [295] have been towed safely to Honolulu or to the nearest point of land on Molokai, some eight or ten miles away?

Mr. Collins: That is correct.

The Court: Do you so understand it?

The Witness: I understand it, your Honor.

The Court: All right.

The Witness: My answer to that question again would have to be "I don't know." It depends on many factors involved.

Q. (By Mr. Collins): For an answer to that question would you have to know the buoyancy factors again?      A. That's right.

Q. Assuming that all of the facts that we have given you exist, that the sampan is where we have described it, in your opinion, if the master of the

(Testimony of Carl Holm.)

tug should cut the towline, would such cutting of the towline be good judgment?

A. Cutting of a towline, with a tow adrift, is always the privilege of a captain of a tug, inasmuch as if the tow is sinking, the safety of his ship is at stake, to the extent that if the weight involved in the tow submerged is sufficient to overcome the stability factor in the ship, when it is hanging over the side, that the towline generally will when the weight comes on it, rather than towing, the danger is that of capsizing the tug. I don't know the size of this particular tug involved, but I can readily see the master's concern over his ship's safety and perhaps that of the crew of the sampan, along with [296] that of his tug, if he lost both ships by reason of the fact that he guessed wrong on the weight of the tow involved. I don't know if that answers the question.

The Court: You touched on the thing I asked in the course of argument, and the answer in argument was that that was not in this picture at all. Remember my asking you that question?

Mr. Quinn: Yes, your Honor. This was a surprising statement to me, because it has been indicated, as was indicated on the stand, that the captain was foolish to think of such a thing. I think I had better develop that on cross-examination, however.

The Court: Being a "land-lubber," I am glad to hear him say that. It supports my question.

(Testimony of Carl Holm.)

Q. (By Mr. Collins): Assuming that the facts are as we have them, as they have been given to you, that the sampan is where it has been located, in your opinion would the safety of the tug be endangered if she continued to tow such a sampan?

A. There again I would have to answer that that I don't know, because even though there is a reserve buoyancy factor when the ship is submerged, there is still the danger of the master of the tug guessing wrongly as to that fact being a constant. In other words, although the sampan might have been deck to and staying in that condition for quite some time, there is still the danger of a deck letting go and the weight becoming [297] too much for the tug's stability. It is hard for me to answer that question, not knowing the other factors involved; and perhaps only technical personnel in the tug master's position would be able to judge clearly as to whether or not it would be safe to tow that ship any further than he did. I can readily see the tug master's decision in cutting the ship adrift because of the fact that he was uncertain, perhaps, of his knowledge in that respect, and rather than risking his ship, he set the tow adrift and thereby made certain that his own tug would stay afloat. Does that answer it?

Mr. Collins: That is all, your Honor.

The Court: Would your answer be the same if you also knew that this was this tug captain's first salvage operation, and he had had no prior experience?

(Testimony of Carl Holm.)

The Witness: I think that his action is more so excusable, in view of the fact that he had no prior experience in salvage towing as such, and that his mind would perhaps be made up sooner in setting the tow adrift, knowing his inexperience, than it would otherwise.

The Court: Excusable or understandable?

The Witness: I would say understandable, your Honor.

The Court: I have another question I want to ask before I turn him over for cross-examination. This line between the tug and the tow, does our evidence show whether that [298] was a cable or a rope?

Mr. Collins: I believe it was a line.

The Court: Is that rope?

Mr. Collins: That is rope.

The Court: What is the method of cutting the line between the tow and the tug ordinarily? An axe?

The Witness: If time is an object, an axe is used. In fact, any tug going to sea for tows in this position has an axe available for that particular purpose at all times. If time is better, perhaps the line is dropped from the tow, or perhaps the tow is brought alongside and the bridle let go or removed from the tow.

The Court: What I am getting at is in relation to your other question, that the tug captain might have feared that the tow's sinking would have

(Testimony of Carl Holm.)

pulled his ship down also. Would it have been the exercise of sound judgment to have stood by with an axe to see if the thing was about to take a dive and thus become dangerous?

The Witness: Yes, your Honor, it would have been good judgment on the towing captain's part to have an axe ready, even though he didn't stand by with the axe in his hand, to at least have it ready.

The Court: But until that tow started taking a nose-dive down into the water—These may be silly questions—was there any danger to the towing vessel, danger of being pulled [299] down to the bottom of the ocean?

The Witness: The danger in that respect, your Honor, can occur within a few seconds, inasmuch as the wreck, or the tow, might be kept afloat by a tank or by simply the strength of a deck, where an air pocket, is in evidence, and the wash of the sea or the surge of the sea might completely change that condition in a very few seconds to the extent that the tow line falls over the side. If there is a line, manila line, which in general is used, of course an axe handy there would carry that in a moment.

The Court: That is what I am getting at.

The Witness: Whereas, if an axe is not handy, a knife may be too slow and the tug would roll over in a moment.

The Court: All right. Cross-examination.



(Testimony of Carl Holm.)

Cross-Examination

By Mr. Quinn:

Q. What type of towing rig have you had in mind in replying to these questions; side by side or front and back?

A. In general the tow is always handled astern, and alongside it would in general, with any kind of sea running or weather conditions, result in damage to both ships.

Q. The reason I asked that question, I was interested in the actions of the tow, perhaps overcoming the stability of the tug. I believed you indicated it would swing over to the side and pull over sideways, capsizing it, capsizing the tug. [300]

A. Yes. There again the tug is generally constructed with its towing bits as close to the pivoting center of the tug as possible. Any ship's pivoting center—or any one of general design, I should say—has its pivoting center about one third from the bow of the ship, and the towing bit can never be installed there, but it is installed as far forward on the towing deck as is practical by reason of substructure and other things aboard. The distance from that towing bit to the towing rack or the stern, to the extreme counter, is generally much greater than that distance from the towing bit to the side of the ship. Therefore, if any weight comes on it after the tug stops towing, that towline, in general, sags over the side because that distance is shorter and the weight coming on it, of course, would bring it around in that position. That at times is com-



(Testimony of Carl Holm.)

batted with what is called Norman pins, a pair of heavy pins on each quarter of the tug that keeps the towline in line over the counter. However, Norman pins are generally removed when a tow is handled at sea because it restricts the steering quality of the tug. In other words, he just as well be towing from the Norman pins if she gave hard rudder. So chances are he didn't have Norman pins or they weren't there; and for a very good reason they were not there. And I could readily see his point, perhaps, in fearing that the towline would sag from the counter over the side of the ship, thereby impairing the transverse stability of the tug. That has occurred. I have [301] not been present at any sinkings, but it is something that towing personnel first of all is instructed in, to see to that, that if a tow is sinking on them, that it is gotten rid of before it comes over the side of the ship, and particularly when a wire is involved because time is——

Q. Mr. Holm, if the tug was making way up to the time it cut the line, and if the hawser at all times was back directly crossing the stern, would you say that there was danger at that time and until something happened to that line or to the position of the tug? At that time would you say there was danger to the tug, bearing in mind there is a sampan back there all the time, which, if it doesn't have complete positive buoyancy, at least, on the assumption you gave, based on the characteristics you gave, has very little negative buoyancy?

(Testimony of Carl Holm.)

A. You have to have positive buoyancy or negative buoyancy. There is nothing in between.

Q. Can't it have a little negative buoyancy? Does it have to plummet it down if it sinks?

A. It can have a little negative buoyancy, but regardless of how little it is, it fast becomes a very dangerous thing. In other words, an object will not stay in between very long. It will either go down or come up.

Q. Can you answer my question before we go into that matter?

A. Yes, I will answer that that I would say that if [302] you had a Manila towline, if the tug is under way, there is little danger of a condition occurring so rapidly that it cannot be taken care of, if the towline was over the stern, over the counter the way it should be.

Q. Do you still have in mind the characteristics of this particular sampan?

A. I am not familiar with that particular sampan. I perhaps seen it, but I don't know.

Q. I mean the characteristics as given to you by Mr. Collins.

A. The length, breadth, and draft is all that is indicated on this paper.

Q. I think the type of engine is indicated.

A. Yes.

Q. Are you familiar with the normal equipment aboard the normal fishing sampan?

A. The normal installation of equipment, I would say.

(Testimony of Carl Holm.)

Q. Installations, yes.

A. Yes, I would say I am.

Q. Now, if—Well, one further preliminary question. Have you any idea how fast wood that goes in to make up a hull loses its buoyancy?

A. That would be very difficult—that would be a very difficult answer to give you.

Q. Make an assumption for the moment that it has never [303] been subject to dry rot and that it has been kept in good seaworthy condition; how long would it take to lose its buoyancy?

A. That depends on the particular wood involved, and it depends on whether or not the particular ship has been in the water all during those years of its existence. I have seen wood with negative buoyancy after many years. For instance, the keel of ships will gradually waterlog to where it has negative buoyancy, whereas the above-water structure and above-water hull generally keeps its positive buoyancy. I would say that it is a thing that could not be generalized.

Q. In your opinion, would you believe that, if there had been proper care, the wood in a hull would not lose its positive buoyancy in four years?

A. I would say that it will lose some of its positive buoyancy, and how much is a question.

Q. Would you say it would become negatively buoyant in four years, in your experience generally?

A. I would say that none of it would become negatively buoyant in four years unless it is monkey-

(Testimony of Carl Holm.)

pod and hard wood that is already negatively buoyant. But I take it for granted that Oregon pine, for instance, is involved. Oregon pine will not become negatively buoyant in four years unless it is subjected to particular circumstances of pressure and weather. But monkeypod and all hard woods practically are negatively buoyant or very much so.

Q. Assuming that this sampan, which had no cargo, fuel tanks half full, and the other characteristics as given to you by Mr. Collins, assuming further that it had a crushed part three inches wide and a foot and a half long, but that that was pulling apart of the grain and opening of seams, rather than a hole, as expressively put by my brother, Mr. Collins, would you say that that sampan would sink?

A. I would say that from what I can see of the specifications of the ship, in regard to length and breadth and depth, and the weight factors in general involved in that type of sampan, that the buoyancy factor of the wood and the weight factor involved would lie very close together. It might be ten per cent in favor either way.

Q. But suppose it were 100 per cent negative, Mr. Holm—we get back to the question that I wanted to explore a moment ago—does that mean that the ship will thereupon plummet down, or does it mean that it would be a gradual process with plenty of time to cut a towline if it should do that?

A. That depends again on what the Court brought up a moment ago; if air pockets are in

evidence, such as they always are in a ship sinking, in tanks and underdeck spaces, and many other places, and they become submerged to the extent that they collapse, which is perhaps only at a depth of five or ten feet for every foot you put down, you have a half pound more pressure, and in general fuel tanks are not constructed to withstand any external pressure, perhaps they would stand a pound or so per square inch, when that ship is submerged five or ten feet, the weight factor becomes suddenly perhaps much greater by reason of those air pockets disappearing.

Q. Well, my question was directed to a time where this vessel remains 10 per cent negatively buoyant. I am not looking right now for the circumstance of sudden collapsing of an air bubble which would increase the negative buoyancy. If it were 10 per cent negatively buoyant all the way, would it plummet down, or would it be a gradual process? I am looking for characteristics of wood that is 10 per cent negatively buoyant for the moment.

A. Well, I would say that the per cent perhaps would amount to approximately two or three feet a second, or something like that, something of that sort. Of course it depends on the surfaces involved. If you throw a leaf in the water, there is a greater surface, and negatively buoyant at 10 per cent, it would take a long time to sink. If you throw a pin in the water, it would go rapidly down. In the case of a sampan, I would say it would amount to



(Testimony of Carl Holm.)

perhaps that much a second. I say 10 per cent because I have no way of judging accurately what it is without knowing the buoyancy factor left in the wood.

Q. You say these sampans are known to be pretty close buoyancy versus weight, one way or the other?

A. That you cannot generalize. Some of them are overpowered [306] and some of them are underpowered, and the weight of the engine is the greater factor in the weight of the ship.

Q. Is this one overpowered or underpowered?

A. I would say that she is powered with normally what those small deep-sea boats use.

Q. Not too much weight for its buoyancy?

A. Well, in installing an engine you would have considered that factor.

Q. Well, I would like to know your opinion of it, Mr. Holm.

A. What my opinion is as to whether or not that is too much weight?

Q. Too much weight for that buoyancy, whether it is or is not.

A. I have no way of judging that without knowing the buoyancy factor left in the wood.

Q. Assuming it were a new ship.

A. Assuming it is new?

Q. A new hull.

A. No question that it would stay afloat.

The Court: Question what?



(Testimony of Carl Holm.)

The Witness: No question that it would stay afloat.

The Court: Stay afloat?

The Witness: Yes.

Q. (By Mr. Quinn): Even though it were full of water up [307] to decks awash?

A. I assume this one has not been re-powered since this paper, 35 horse diesel, or something like that?

Q. That's right. In other words, if it were new and decks awash, of course it would stay afloat?

A. That's right.

Q. And you are not too much inclined to express your opinion about wood that is four years old without knowing the type of wood and the exact treatment it has had over those four years?

A. That would be a hard thing to do. It depends on the type of wood and the treatment that it has had.

Q. But you say generally wood, after four years of normal treatment, would lose some, but little——

A. That's right.

Q. (Continuing) ——positive buoyancy?

A. Yes, sir.

Q. Do you recall any cases of sampans sinking out here?

(Testimony of Carl Holm.)

A. I recall only one, of one of the pineapple company's tugs striking one, or a collision at sea, and I don't know what the circumstances were then.

Q. And did that sampan sink?

A. That I don't know. I don't know what the circumstances were or whether it sank, or what happened to it.

Q. Would you recall the name of the boat? [308]

A. Yes, I do. I believe it was brought into our dock and we fixed it up. She floated.

Q. She floated? A. Yes.

Q. And it was towed in from where?

A. That I don't know.

Q. Wasn't it the Molokai Channel?

A. That I don't know. I recall her laying alongside of our wharf and our men taking the body out from under it. They told me, before I got there.

Q. But that had a hole below the water line, didn't it?

A. She was very much damaged, yes.

Q. And was that a Hawaiian Pineapple tug that towed it to Hawaiian Tuna Packers?

A. That I don't know. She was secured there before I got there in the morning. I don't know who towed it in.

Q. Did you ever hear of a ship known as the Kasuga Maru? A. Kasuga Maru?

Q. Yes. A. I don't recall the name.

Q. So, do I understand that the only sampan you can recall sinking is the boat that was hit by

(Testimony of Carl Holm.)

the Hawaiian Pineapple barge and which was then towed in? [309]

A. Yes. Let's see, the small one that sank—the small one that had a fire while she was lying at the wharf, Kewalo Basin and I think we brought over to Hawaiian Tuna Packers.

Q. You pulled that over to Hawaiian Tuna Packers?

A. Yes. And I took the Marlin off the reef from Kauai, 75-foot sampan.

Q. Wooden? A. Wooden hull.

Q. Was she damaged below the water line?

A. Very much. She was high and dry when I got to her.

Q. Where did you tow her to?

A. We removed the engine from her, however, so that wouldn't have any bearing. The Islander was damaged beyond repair when she went on the reef at Maui. I flew over there to examine that for the underwriters. And the Alaska, the Government hull, when she submerged in a storm off of Hawaii.

Q. That was a sampan, the Alaska?

A. No, she was fishing craft.

Q. But, do you know this sampan, which I believe was over at Tuna Packers not long ago, called the Helena or Helene? A. Yes.

Q. There is prior testimony in this case that the Helene or Helana—I forget the name of it—is virtually a sister ship to the sampan involved in this case. Were you able to tell that by looking at the

(Testimony of Carl Holm.)

specifications, or does this create a [310] clear picture in your mind?

A. Well, when you consider that there are more than 100 sampans here, it is hard for a man to remember which is what, and my capacity as vice president puts me into many other things rather than the smaller jobs in the yard, which are routine. I will look at the Helene for my own interest in the case—or for my own interest, rather—but it doesn't strike a familiar sound at present. Was she submerged recently?

Q. Well, she sank sometime ago and then was towed in and rebuilt and is now still under the new name. It was the Kasuga Maru that I asked you about before. A. Yes.

The Court: It sank and was towed in?

Mr. Quinn: It sank in the same sense as Mr. Holm used it a while ago, and was then towed in, yes, your Honor.

The Court: Before we go any further, as I understood Mr. Holm, he started to tell us of knowing of one sampan that did sink. Then I thought he corrected himself and talked about that same vessel being towed in with a hole in it. I am still not clear as to whether or not he is telling us of the fact that he does know of one sampan that did sink. If so, will you please clear that up.

The Witness: I don't know of any sampan that has been lost at sea through sinking, your Honor.

(Testimony of Carl Holm.)

The Court: Well, then, as I understand it, the sampan that you thought at first did sink was a sampan that was hit by a Hawaiian Pineapple barge; there were some lives lost in the collision.

The Witness: Yes.

The Court: Despite the injury to the sampan, which I take it was serious, it was towed successfully to Kewalo Basin from Molokai Channel?

The Witness: I don't know where she was towed from, your Honor. I came in there in the morning and found a vessel, sampan, alongside the wharf and read in the paper the same day that she had been struck by one of the pineapple tugs.

The Court: And you put two and two together?

The Witness: Yes.

Q. (By Mr. Quinn): You don't recall where that collision occurred between the Hawaiian Pineapple barge——

A. No, I don't recall.

Q. Well, Mr. Holm, taking a sampan of the characteristics of the Tenyo Maru, as disclosed by that bill that you have, and assuming that the sampan had had a major overhaul in 1944, and from 1946 to the date that it was abandoned, it was in dry dock not less than once every five months, and that at the time it was in dry dock anything that looked like it needed repairing was repaired, would you say that the master of the Kolo exercised good judgment in cutting the towline, which was at that time astern and the tow was making headway and the tug [312] was making headway at the time that the

(Testimony of Carl Holm.)

sampan was first noticed to be deck awash with four feet of freeboard forward and the neckhouse above water?

A. I believe, as I said, unless I knew the other factors involved, if any, such as sea and wind conditions——

Q. Well, the sea conditions normal for the channel, wind conditions a little bit brisker than normal, the tug master's first tow in the open sea. I believe you can postulate also that those are the only factors which he has told us he knew.

A. I believe the lack of knowledge on the part of the tug captain, lack of experience, had more bearing on his decision than any other factor involved, as you state them, and perhaps that very factor that made him decide to let go of the tow, not knowing exactly what the conditions would be if the weight came over the towline on the side.

Q. If you had been faced with those same conditions, being an experienced tow and salvage man with considerable training, if you were faced with those conditions and you saw that your tow was decks awash and you knew that it was a sampan without cargo—let's put it that way, that is all you knew—would you have ordered the towline cut at that moment? A. With the experience——

Q. With your experience.

A. With my experience, I would have carried on for quite a while. I would have towed until I was absolutely sure [313] that she would submerge.



(Testimony of Carl Holm.)

However, as I say, his inexperience and lack of knowledge of stability factor and buoyancy factors involved, I can hardly blame him for his action. If I was in his boss' shoes—a small tug requires a small master, perhaps, and he couldn't expect to have a salvage expert at the wheel of a 60, 70-foot tug.

Q. You would expect a man to be competent to take care of those things he had in tow, though, would you not?

A. Well, that again depends on many factors. In the Navy, yes.

Q. Yes.

A. In commercial towing, why sometimes very hard to get experts at the price involved in towing sampans and other things.

Mr. Quinn: I have no further questions.

The Court: Redirect examination.

### Redirect Examination

By Mr. Collins:

Q. Mr. Holm, do you consider yourself as more experienced than the normal run of tow masters?

A. More experienced than normal?

Q. Yes. A. In tow masters?

Q. Yes. A. I believe that, yes. [314]

Q. Would you say that the tow master, under the circumstances that have been given to you, without knowledge of when the ship had last been docked, or of any other conditions outside of what

(Testimony of Carl Holm.)

was available to him by a surface inspection, that he exercised bad judgment in cutting the tow at that time?

A. I would say that if I was in possession of the same amount of experience and same lack of experience, perhaps as he, I would have acted in the same manner.

Q. Would you say that, if he had had an average amount of experience, cutting the tow, under those circumstances, would be bad judgment?

A. Well, that answer would depend on many factors. I don't think it is quite a fair question because I am not sitting here and judging the factors involved. There may have been other factors involved, or rather in addition to those, that might have a bearing on a decision in that case. For instance, the power of the tug, how long it will take him to make port, and weather reports, and condition of his own tug to carry on under such conditions; there are so many things involved in making a decision like that that it would hardly be fair to he or I to judge it from the witness stand.

Mr. Collins: No further questions.

Mr. Quinn: I have no further questions.

The Court: Thank you very much. You are excused.

(Witness excused.) [315]

The Court: You are through?

Mr. Collins: Yes, sir.

The Court: Mr. Quinn, do you still wish to avail yourself of the wide open opportunity to put on additional testimony in this line?

Mr. Quinn: It is a wide open opportunity presented, your Honor, but I think that the experts are enough in agreement that I don't care to put on any more, your Honor, unless your Honor would care, now that it is open, to hear more evidence, in which case I would be happy to produce it.

The Court: Very well. I do not desire any more, but I am very glad that I did reopen because I think the Captain has given us the best insight into this problem that we have had. He certainly is an expert in his field, whereas the other man may be an expert, but I don't think he is quite as much of an expert as this man is.

Mr. Quinn: He was only a lieutenant commander, your Honor.

The Court: Well, I think I might as well decide this case now as later. I have already made tentative findings of fact and conclusions of law indicated, and I have perused your memos and reflected on the matter for some time. I am going to subscribe to the in rem theory and to confirm the tentative findings of fact which I have previously made.

I conclude, therefore, that, being in lawful possession of [316] the Tug Kolo, the tug itself, which is the thing here sued in admiralty, is liable for the torts which it was made to commit by its captain, or perhaps more accurately stated in the language of the admiralty cases, the vessel itself committed

the torts. The question essentially is one of liability. I am satisfied that at the time the Tug Kolo undertook to tow the injured sampan from Kaunakakai to Honolulu the negligence on both sides of the picture at that time can well be said to have been equal, for both the tug captain and the sampan owner had an equal opportunity to know, and should have known, each of them, that there were risks involved.

But, coming to the point where we find this tug and its tow in the channel, under conditions that have been here explained and elaborated during the questioning of the witness this afternoon, we find that we have a small-sized tug, operated by a captain who has had no prior experience in salvage, who has at his right hand an able-bodied seaman, as you might call him, a Filipino man who has had considerable experience, who told us—the tug captain told us that—which I can hardly believe—from the time he last looked at the tow, in broad daylight, in Molokai Channel, from that time to the time he walked the length of his tug and back again the tow had become awash. I say I can hardly believe that it became awash that quickly, but even though I can hardly believe it, I believe he might have seen it becoming awash if he had paid proper attention to it. I [317] am not sure that that situation has any bearing on the ultimate decision which I will make, but I comment on that in passing.

That is the situation from the standpoint of the tug, whereas as to the tow we have a broad daylight situation, a vessel of the type described in Exhibit

1, and as you gentlemen have outlined the conditions in your hypothetical questions this afternoon—perhaps I had better recite them; namely, a sampan of the type described in Exhibit 1, with no cargo but the usual fishing tackle; one gas tank full and one half full, or part full; and a crew of three, I believe, aboard, the captain of the sampan being not licensed for this trip, but an experienced captain of a sampan nevertheless; with a gasoline motor aboard to do some pumping, which, by the action of the wind and the waves, became useless; the vessel being one that was overhauled completely in 1944 and periodically thereafter kept in good condition, but at the time had suffered an injury by being on a reef, in that it had a crushed section in the underneath part of its hull under its tanks; and the water conditions in the channel being normal, which is rough; and the wind being a bit brisker than usual; that is the situation that we find; that the towing equipment consisted of a hemp rope connecting the tug and the tow, and that the towline at all times in question remained over the stern of the tug.

Right there, at that point, even though up until then [318] both the owner of the sampan and the captain of the tug were, in my opinion, each equally negligent, at the point, under those conditions, when the tug captain observed the sampan for the first time to be awash with but four feet of the bow showing and a portion of the deckhouse showing, the sampan's crew sitting atop it, inviting the tug



to come take them off, I am satisfied that by lack of his experience the tug captain was negligent in cutting too quickly the towline; and, under similar circumstances, an experienced person would not have been as quick to have cut that towline, and it would have been possible, in the light of the experience with sampans that has been had here and to which the captain testified, Mr. Holm, in view of the condition of this particular sampan, despite its injury, for an experienced tug operator to have successfully towed that sampan to Honolulu, because I feel that he was understandably, but not excusably, negligent in being too fast in cutting that towline and sailing away and leaving that sampan adrift and awash. And I find that the tug is liable wholly for this maritime tort.

Now, you may submit findings of fact and conclusions of law consistent with this opinion, conforming as to form, and I will sign them.

Mr. Collins: May we have an exception.

The Court: You may, and I think there is some provision in admiralty where you have to write up exceptions and [319] get them allowed, and I shall be happy to approve them when they, too, are in proper form.

All right.

(Thereupon, at 3:05 p.m., May 23, 1949, the hearing in the above entitled matter was adjourned.)



I, Lucille Hallam, Official Reporter, United States District Court for the Territory of Hawaii, do hereby certify that the foregoing is a true and correct transcript of my shorthand notes in Admiralty No. 409, John Cho, Libellant, vs. The Tug "Kolo," her boats, engines, machinery, tackle, etc., Respondent.

July 11, 1949.

/s/ LUCILLE HALLAM.

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[Endorsed]: No. 12363. United States Court of Appeals for the Ninth Circuit. Young Brothers, Limited, Claimant of the Tug "Kolo" her boats, engines, machinery, tackle, etc., Appellant, vs. John Cho, Appellee. Apostles on Appeal. Appeal from the United States District Court for the Territory of Hawaii.

Filed September 22, 1949.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals  
for the Ninth Circuit

No. 12363

YOUNG BROTHERS, LIMITED, Claimant of  
the Tug "Kolo," her boats, engines, machinery,  
tackle, etc.,

Appellant,

vs.

JOHN CHO,

Appellee.

STATEMENT OF POINTS TO BE RELIED  
UPON BY APPELLANT ON APPEAL

Comes now Claimant Appellant, Young Brothers, Limited, and in conformance with Rule 19(6) of the Rules of Practice of the United States Court of Appeals for the Ninth Circuit, and hereby states that it is intended that the Appellant shall rely upon the following points:

(1) That the Tug Kalo is not liable in rem for the loss of the Sampan Tenyo Maru under the facts as they appear in the record;

(2) That the master of the Tug Kolo was not negligent in cutting the tow line on the Sampan Tenyo Maru, but in so doing exercised his best judgment to save the tug and the lives of those aboard the same; that if any fault attaches to the master of the tug for so doing, such fault is legally excusable under the circumstances of the case;

(3) That the cutting of the tow line was not the sole cause of the loss of the sampan, but that said loss was caused by her unseaworthy condition, which was known to the Libellant at the time the tow was undertaken;

(4) That for the reasons stated in the Assignments of Error filed herewith, the District Court erred in awarding the Appellee the decree in the sum of Eight Thousand Dollars (\$8,000.00) with interest and costs.

Dated: Honolulu, T. H., this 28th day of September, 1949.

SMITH, WILD, BEEBE  
& CADES,

By /s/ J. EDWARD COLLINS,  
Proctors for Appellant.

[Endorsed]: Filed Oct. 3, 1949.

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[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF THE RECORD  
TO BE PRINTED

Comes now Claimant Appellant, Young Brothers, Limited, and by and through its proctors, Smith, Wild, Beebe & Cades, does hereby designate the following portions of the record to be printed:

1. Libel, Interrogatories and Monition;
2. Stipulation of Libellant's Costs;
3. Claim of Owner, Young Brothers, Limited, and Release Bond of Claimant Owner;

4. Answer;
5. Answer to Interrogatories;
6. Transcript;
7. Libellant's Exhibit No. 1;
8. Bill of Costs and Affidavit;
9. Findings of Fact and Conclusions of Law;
10. Decree;
11. Notice of Appeal and Order;
12. Bond for Costs on Appeal;
13. Order Extending Time for Filing of Record on Appeal and Docketing of Appeal;
14. Assignments of Error;
15. Citation;
16. Appellant's Designation of Apostles on Appeal and Praeceptum Therefor;
17. Certificate of Clerk.

Dated: Honolulu, T. H., this 16th day of September, 1949.

SMITH, WILD, BEEBE  
& CADES,

By /s/ J. EDWARD COLLINS,  
Proctors for Appellant.

To: Robertson, Castle & Anthony, Proctors for Appellee.

To: Clerk, United States Court of Appeals for the Ninth Circuit.

[Endorsed]: Filed Sept. 22, 1949.